SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 94.

ELIZABETH WETZEL ET AL., APPELLANTS,

vs.

THE MINNESOTA TRANSFER COMPANY, ET AL.

RESPONDENTS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT.

This suit was commenced by the appellants in the United States Circuit Court for the District of Minnesota, on the 28th day of May, 1892, to establish their title to the following described tract of land situate in the County of Ramsey, State of Minnesota, and within the corporate limits of the City of St. Paul, to-wit: the southwest quarter of section 28, township 29 N., Range 23 W., which was patented by the United States to Nathan C. D. Taylor, as assignee of Elizabeth Remsen in her own right and as guardian of the minor heirs of George W. Remsen, deceased. The respondents claim under Taylor, and are several hundred in number, of whom 208 are alleged to be abso-

lute owners of several tracts or lots. The remaining respondents, greater in number, are alleged to be lien holders by judgment or otherwise upon various premises comprised within such tract.

A large part of the property was subdivided into lots and blocks long before the commencement of this action, and many residences have been built thereon. The property, long before the commencement of this action, had been traversed, and is now occupied, by nearly all of the railroad lines centering in St. Paul and Minneapolis. The westerly sixty acres of the tract became the property of the Minnesota Transfer Railway Company May 18, 1880. (Record, p. 159.) This company effects upon this tract the railway transfers of freight coming from all directions to St. Paul and Minneapolis, and bound to destinations beyond those cities. This company commenced its improvements in 1880 or 1881. (Record, p. 159.) They consist of tracks, warehouses, stockyards, derricks, platforms, scales; and a great part of these improvements were put on the property in 1881 and 1882 at an expense of several hundred thousand dollars.

The value of the entire 160 acres, exclusive of the tracks, buildings and improvements, was estimated by Mr. Lovering (p. 162) at $1,177,500 by Mr. Charles H. Pratt (p. 172) at $1,177,500, by Mr. Hazard (p. 179) at $1,000,000, by Mr. Rosmun (p. 184) at $1,165,500, by Mr. Fairchild (p. 189) at $1,129,000, in June, 1892. Their testimony is not contradicted.

George W. Remsen was a soldier in the Mexican war, and by virtue of his enlistment and service, he became entitled, under the provisions of the ninth section of an act of Congress, approved on February 11, 1847, to one hundred and sixty acres of land. (9 Statutes, p. 123, 125.) Remsen died in the service in the month of October, 1847, and under the provisions of said act, his right to said land inured to the benefit of his surviving wife and children. On September 30, 1848, a warrant was duly issued to Elizabeth Remsen, widow of said George W. Remsen, and to Harriet A., Mary Ann, John W., Elizabeth and George W. A. Remsen, children and heirs-at-law of said George W. Remsen, deceased, who was described in the warrant as "late a private in Company K, Third regiment United States infantry." At the

time of the issuance of said warrant all of said children were minors, Harriet A. Remsen, the oldest, being then about seventeen years of age. Section nine of the act of February 11, 1847, aforesaid, provided in substance that in the event of the issuance of a land warrant under said act to the minor children of a deceased soldier, "then the legally constituted guardian of such minor children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the orphans' or other court having probate jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested."

Elizabeth Remsen qualified as guardian of all the minors aforesaid except Harriet A., the oldest, before the Orphans' Court of the County of Philadelphia, State of Pennsylvania, on October 6, 1848. Subsequently and on the 11th of October, 1848, she sold and assigned the land warrant in question to Nathan C. D. Taylor, who located the same on the land now in controversy, and received a patent therefor as heretofore stated. The assignment of said land warrant was executed by said Elizabeth Remsen, the mother, in her own behalf, "and as guardian of the minor children of George W. Remsen, deceased;" but she appears to have obtained no order from the Orphans' Court aforesaid authorizing her to sell her children's interest therein. The assignment of the land warrant was also executed by Harriet A. Remsen, the oldest daughter, who had previously become the wife of Jacob Heyer, but her husband did not join with her in the execution of the assignment.

By numerous mesne conveyances covering a period of many years, the title to the aforesaid tract of land thus acquired by Nathan C. D. Taylor has now become vested in very many persons who are in possession of different parcels of the land and who were made parties defendant to the bill of complaint.

All of the aforesaid minor children of George W. Remsen, deceased, lived to attain their majority and for some years thereafter. The youngest of them, George W. A. Remsen, attained his majority as early as the year 1863, the others, except Harriet A., in the years 1856, 1858 and 1861.

Elizabeth Wetzel, one of the appellants, is the former wife of the soldier, George W. Remsen, who died in October, 1847, she having married Paul Wetzel since the death of her first husband. Harriet A. Van Zant, another of the appellants, is the oldest daughter of said George W. Remsen, who joined with her mother in the sale and assignment of the land warrant as heretofore stated. John Wesley Remsen, also one of the appellants, is a son of George W. Remsen, deceased. The other children of said deceased heretofore named, to-wit: Mary Ann, Elizabeth and George W. A. Remsen, appear to be dead and their interests are represented in the present proceeding by the other appellants, to-wit: by Emma F. Hergesheimer and Maggie L. Beckman, who were the daughters of Mary Ann Remsen, and by Mary J. Remsen and her children, George W., Clara B. and Mabel Remsen, who are respectively the widow and lineal descendants of George W. A. Remsen, now deceased. Elizabeth Remsen appears to have died leaving no lineal descendants.

It is claimed in behalf of the appellants that the sale and assignment of the aforesaid land warrant was utterly void as to the interests of all the minor children of George W. Remsen other than Harriet A., who joined in the assignment of the same, because the assignment made by their mother and guardian was not authorized by any order or decree of the Orphans' Court of the County of Philadelphia. They, therefore, prayed that the title of such heirs to an undivided interest in the tract of land aforesaid might be established, and that the defendants holding under the patent issued to Nathan C. D. Taylor might be adjudged to hold the legal title so acquired in trust for the appellants, and that they might be required to convey the legal title to the land so held to the appellants.

On the final hearing the suit was dismissed on the ground of laches. The complainants appealed to the Circuit Court of Appeals, which court, on December 10, 1894, affirmed the decree of the Circuit Court. (P. 232.) The opinions of the Circuit Court and of the Court of Appeals, respectively, are printed in the record. (P. 208 et seq., and p. 225 et seq.)

There is no allegation in the bill of fraud in the transfer of the warrant to Taylor, nor, indeed, is there any allegation of any fraud whatever. The contention of the appellants is that the transfer was void as to the minor children, because it was not authorized by an Orphans' or Probate Court, and that, therefore, the various defendants ought to be adjudged as trustees for the appellants.

The respondents maintain that:

1. This action is barred by the Minnesota Statute of Limitations pleaded in the several answers.

2. The right of the complainants to relief, if they ever had any, is barred by their laches and by that of their ancestors.

3. The warrant in question was personal property and was assignable by the guardian of the minors.

4. Whether the Orphans' Court had authorized the guardian to sell and assign this warrant is a question of fact which was to be, and was, considered by the Interior Department in issuing the patent. The determination of the department upon this is conclusive, under the circumstances of this case.

5. The patent raises a presumption that all the requisites of law previous to its issue have been complied with.

6. By expressly ratifying in the bill the location of the warrant, the complainants ratify the assignment of the warrant to Taylor, and disentitle themselves to the relief specially prayed.

ARGUMENT.

I.

THIS ACTION IS BARRED BY THE MINNESOTA STATUTE OF LIMITATIONS PLEADED IN THE SEVERAL ANSWERS.

The statutes in force when these actions were commenced were as follows:

"Actions can only be commenced within the period prescribed within this chapter after the cause of action accrues, except where in special cases a different limitation is prescribed by statute." (G. S. Minnesota 1894, sec. 5,133; G. S. 1866, ch. 66, sec. 3; G. S. 1878, ch. 66, sec. 3.)

"No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seised or possessed of the premises in question within fifteen years before the commencement of the action. The periods prescribed in the preceding section for the commencement of action are as follows:" (Id., sec. 5134; G. S. 1866, ch. 66, sec. 4; G. S. 1878, ch. 66, sec. 4, as amended 1889, Session Laws, ch. 91, sec. 1.)

"Within six years:

"Sixth. An action for relief on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

"Seventh. Actions to enforce a trust or compel an accounting, where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same." (Id., sec. 5136; G. S. 1866, ch. 66, sec. 6, as amended 1877, Session Laws, ch. 24, sec. 1; G. S. 1878, ch. 66, sec 6.)

"If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, is, at the time the cause of action accrued, either:

"First, Within the age of twenty-one years; or,

"Second, Insane; or,

"Third, Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life.

"The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought, cannot be extended more than five years by any such disability, except infancy, nor can it be so extended, in any case, longer than one year after the disability ceases." (Id., sec. 5147; G. S. 1866, ch. 66, sec. 17, as amended 1869, Session Laws, ch. 60, sec. 1; G. S. 1878, ch. 66, sec. 17.)

George W. Remsen, the soldier, left him surviving the five children named in the bill. Each of them attained the age of twenty-one years. The youngest reached that age in 1863. Three died after attaining that age. The death of the last of these three took place in 1882. So that from 1863 as to the youngest and from the various years anterior to 1863 as to the others when they severally attained their majority the statute of limitations has been operative against them.

When the statute of limitations begins to run subsequent disability will not interrupt it.

Gordon v. Gilfoil, 99 U. S., 168.
Braun v. Sauerwin, 10 Wall., 218.
Hogan v. Kirtz, 94 U. S., 773.
McDonald v. Hovey, 110 U. S., 619.

Where time has commenced to run against the ancestor it still continues to run against the heir although the latter is an infant.

Williams v. First Presby. So., 1 Ohio St., 478.
Henry v. Conn, 12 Ohio, 193.
Wilson v. Harper, 25 W. Va., 179.

Burk v. Western Land Association, 40 Minn., 506, was, like the case at bar, an action to enforce an implied trust in real property, the legal title to which was claimed to have been wrongfully granted by patent from the United States to the defendant's grantor, in violation of a prior vested right of the plaintiff.

Burk entered the land under the pre-emption laws in September, 1858; in October, 1858, a patent issued from the United States, and without notice to Burk, to the defendant's grantor. Burk was at that time in the actual possession of the land; his pre-emption entry was then a subsisting claim on the records of the land department, and it was not canceled until some time in 1861; he was given no hearing or opportunity to appeal in the matter of issuing the patent or in the cancellation of this entry. He did not bring his action until January, 1887. The court said:

"The action was clearly barred by the seventh subdivision of sec. 6, ch. 66, Gen. Stat. 1878, which, although not passed until 1877, is applicable to pre-existing causes of action. Stine v. Bennett, 13 Minn., 138. If there were any facts taking the case out of the statute or excusing this long delay, the plaintiff ought to have set them up."

In respect of the answer that the plaintiffs, their ancestors, etc., were not seised or possessed of said land of any part thereof within fifteen years before the commencement of this action, we have to observe that, where there is a statutory bar at law, the same period is also, either by analogy or in obedience to the statute, adopted as a bar in equity.

Lord Camden, in Smith v. Clay, cited in the note to Deloraine v. Browne, 3 B. C. C., 639, said:

"As a court of equity has no legislative authority, it cannot properly define the time of bar by a positive rule to an hour, a minute, or a year; it is governed by circumstances. But as often as parliament has limited the time of actions and remedies to a certain period in legal proceedings, the court of chancery has adopted that rule, and applied it to similar cases in equity; for when the legislature has fixed a time at law, it would be preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period that law is confined to by parliament; and therefore in all cases, where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar."

Lord Redesdale, in Hovenden v. Lord Annesley, 2 Sch. & Lef., observed:

"It is said that courts of equity are not within the statute of limitations. This is true in one respect; they are not within the words of the statutes, because the words apply to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely by analogy to the statutes; they act in obedience to them."

And again:

"I think the statute must be taken virtually to include courts of equity; for when the legislature has by statute limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have con-

templated that equity followed law; and therefore it must be taken to have virtually enacted in the same case a limitation for courts of equity also."

See also Medlicott v. O'Donell, B. & B., 166; Marquis of Cholmondeley v. Lord Clinton, 2 J. & W., 151; Foley v. Hall, 1 Ph., 405; Knox v. Gye, 5 L. R. H. L., 674.

Commenting upon these cases Mr. Lewin observes (p. 1163) in his work on Trusts:

"Upon these principles, then, an equitable claim to land could never have been enforced after a lapse of twenty years; for though to writs of right and formedon much longer periods were allowed at law, yet equity always looked upon these as peculiar and excepted cases, and guided itself rather by analogy to the statute of James which fixed the limitation to the prosecution of rights of entry."

The same principle was declared by the Supreme Court in Elmendorf v. Taylor, 10 Wheat., 152—see extract from opinion of Marshall, C. J., set out *post* in our discussion of the defense of laches.

The bar of six years imposed by the Statutes of Minnesota was decisively applied by the United States Circuit Court of Appeals in St. Paul, S. & T. F. Ry. Co. v. Sage, 1 U. S. Circuit Court of Appeals Rep., p. 256. It was sought in that case, as in this, to enforce a constructive trust as to lands. We venture to set forth the opinion quite at length.

The case arose upon the following facts:

"On the twenty-sixth day of January, 1886, there was filed in the United States Circuit Court for the District of Minnesota by the Hastings & Dakota Railway Company a bill in equity, in which it was averred that the complainant was the real owner of the 20,807 acres of land above named; that the same had been wrongfully certified and conveyed to the St. Paul, Stillwater & Taylor's Falls Railway Company; that by the terms of the act of congress of July 4, 1866, and the location of the line of railway, and the filing of the map showing such location, the equitable right and title to said lands had passed to the complainant company before said lands had been selected and certified as indemnity lands for the benefit of the St. Paul, Stillwater & Taylor's Falls Company, which was made the defendant to the bill, and a decree was prayed to the effect that the defendant be

decreed to hold all said lands, and the legal title thereof, in trust for complainant, and to convey the same, or that the title thereto be passed to complainant, as provided by the statutes of the State of Minnesota, and for other and further relief." The court said:

"We propose to first consider the questions arising upon the plea of the state statute of limitations, the overruling of which is assigned as error. On behalf of the complainant it is argued that when courts of the United States, sitting in equity, are called upon to determine and enforce rights arising under acts of congress, the provisions of a state statute of limitations cannot be made applicable thereto. Where rights to property are created by acts of congress, and the procedure for enforcing or protecting the same is likewise created by congressional action, and the jurisdiction is conferred exclusively upon the federal courts, as in matters pertaining to patents, and the like, then it may well be claimed that state statutes of limitation do not apply thereto; but in cases wherein the jurisdiction over the subject-matter of controversy is concurrent in the state and federal courts, why should not force be given to the state statute in both courts? In England the statute was originally applicable only to actions at law, but courts of equity, in all cases of concurrent jurisdiction, gave full effect to the provisions of the statute, acting, as it was said, by way of analogy; but by the act of 3 and 4 Wm. IV. suits in equity were brought within the express provisions of the statute. In Minnesota the statute in terms is applicable to proceedings at law and in equity, and is therefore binding upon the state courts, without regard to the nature of the jurisdiction that is being exercised in the given case, or, as it is said by the Supreme Court in Godden v. Kimmel, 99 U. S., 201:

"'Statutes of limitation form part of the legislation of every government, and are everywhere regarded as conducive, and even necessary, to the peace and repose of society. When they are addressed to courts of equity as well as courts of law, as they seem to be in controversies of concurrent jurisdiction, they are equally obligatory in both forms as a means of promoting uniformity of decision.'

"The general question under consideration is quite fully discussed by Mr. Justice Harlan in delivering the opinion of the court in Kirby v. Railroad Co., 120 U. S., 130; 7 Sup. Ct. Rep., 430, in which it is held that the jurisdiction in equity conferred upon the courts of the United States cannot be impaired or impeded in execution by state statutes of limitation, and particularly in cases solely of equitable cognizance; that in cases of concurrent legal and equitable jurisdiction, subject to the rule of carefully preserving the equitable jurisdiction of the federal courts unimpaired, the court of equity is bound to enforce the state statute of limitations, and in cases of equitable cognizance solely the court will, by way of analogy, apply the provisions of the state statute applicable to the subject-matter of the controversy, and thus give effect to the salutary principle underlying these statutes of repose. In applying these principles to the

facts of the particular case then under consideration, the court held that it would not, the case being in equity, apply a provision of a state statute that would bar relief in equity against an actual secret fraud in a given number of years from the perpetration of the act of fraud, but would apply the limitation in accordance with the equitable principle recognized in the federal courts; that the bar caused by the lapse of time should not begin to run until the discovery of the fraud by the one aggrieved thereby, or the equivalent of such discovery. It appearing, however, that nearly seven years had elapsed after the discovery of the fraud, the court held that the limitation of six years provided in the statutes of New York, from which state the cause came to the Supreme Court, was a bar to the proceeding.

"In Wood v. Carpenter, 101 U. S., 135, will be found a very instructive discussion of what is required in the way of pleading and proof, when it is sought to avoid the bar of the statute on the ground of lack of knowledge of the alleged fraud. It is therein said:

"'Statutes of limtations are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay extending to the limit prescribed is itself a conclusive bar. The bane and the antidote go together.'

"The court then proceeds to show that the principle that the bar of the statute, in cases of fraud, is not usually held to begin to run until the discovery of the fraud, is a rule originally established by courts of equity, and thence imported into the statutes; that a party who seeks to avoid the plea of the statute is bound by stringent rules of pleading and evidence; that there must be distinct averments as to the time when the fraud, misrepresentation or concealment was discovered, and the nature thereof, so that the court may see whether, by ordinary diligence, an earlier discovery might not have been made; that a general allegation of ignorance at one time, and of knowledge at another, are of no effect; that a party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and, if he had the means of knowledge or discovery in his power, he will be deemed to know all that, with ordinary care, he might have obtained knowledge of; that the fraud which will arrest the running of the statute must be one that is secret and concealed, and not one that is open and known.

"In Bicknell v. Comstock, 113 U. S., 149; 5 Sup. Ct. Rep., 399, it appeared that an action for the breach of the covenants of warranty in a conveyance of lands in Iowa was brought in the United States Circuit Court for the Eastern District of New York; it

being claimed that the superior title was in the State of Iowa under a congressional grant to the state. It appeared in the cause that in May, 1869, a patent in due form had been issued conveying the land to Bicknell, which patent was forwarded to the local land office at Fort Dodge, Iowa, for delivery to Bicknell. In June, 1878, the commissioner of the general land office ordered the patent to be returned to his office, and on its reception he tore off the signature of the president, and erased the record of the patent in the general land office. It was pleaded in the case that Bicknell and his grantees had been in the actual possession of the premises since May 23, 1862, and had made valuable improvements on the land. The Supreme Court held that, without deciding whether the patent conveyed a valid title or not, Bicknell and his grantees were in possession under claim and color of title, and that the provisions of the Iowa statute, making 10 years' possession a bar, was applicable to the case, regardless of whether the suit was at law or in equity, citing in support of the ruling, the cases of Leffingwell v. Warren, 2 Black, 599; Croxall v. Sherrerd, 5 Wall., 289; Dickerson v. Colgrove, 100 U. S., 583. These citations are sufficient to show, as is said in Leffingwell v. Warren, supra, 'that the courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of limitation of the several states, and give them the same construction and effect which are given by the local tribunals.' There is nothing in the subject-matter of the controversy now before the court that takes the case out of the general rules thus enunciated by the Supreme Court. The land described in the bill is situated in the State of Minnesota. The original parties to the litigation are both corporations created under the laws of the state. The question in dispute between them is, which party is the owner of the land; and, while the settlement of that question involves, among other matters, the construction of the several acts of congress making grants to the State of Minnesota to aid in the construction of certain lines of railway, that fact does not make the litigation solely and exclusively of federal jurisdiction. This proceeding to settle the rights of the respective parties to these lands could have been brought in the proper court of the State of Minnesota, and its jurisdiction to hear and determine all questions arising in the case would have been beyond dispute. If the suit had been thus brought in the state court, can it be doubted that it would have been the duty of that court to give full force to the state statute of limitations, had the same been pleaded in the case? If any of the provisions of the statute—a statute wisely enacted to give stability to titles, thereby promoting confidence, and encouraging the improvement of the lands of the state, and intended to prevent the evil of parties waiting until by lapse of time valuable evidence may be rendered difficult of procurement or wholly unattainable, and then preferring doubtful and speculative claims—would have barred the suit if brought in the state court, why should not the same bar be effectual when the proceeding is in the federal court? Upon both principle and authority we are of

the opinion that the case is one in which the federal court, sitting in equity, should give the same force and efficacy to the provisions of the state statute that would be given thereto if the cause was pending before a court of the State of Minnesota.

"In the state statute are to be found two clauses which it is claimed have relation to a suit of this character, being subdivisions 6 and 7 of sec. 6, ch. 66, tit. 2, of the General Statutes of Minnesota, the limit of time applicable to each being six years. These clauses read as follows:

"'Sixth. An action for relief on the ground of fraud; the cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

"'Seventh. Actions to enforce a trust or to compel an accounting where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same.'

"In the absence of an authoritative construction of these clauses of the statute by the Supreme Court of the State of Minnesota, we should be of the opinion that the proceeding now before the court comes within the sixth subdivision above cited. That subdivision covers actions for relief on the ground of fraud; and, as the statute is undeniably intended to include proceedings at law and in equity, it may well be argued that the clause includes not only such actual frauds as may form the basis for actions at law, but also such transactions as a court of equity will adjudge to be frauds, actual or constructive; thus including cases wherein a party, having become vested with the title of property rightfully belonging to another, refuses to convey the same to the real owner, or to account to him for the value thereof, in case the same has been sold and the money appropriated by the one not entitled thereto, which withholding of the property or its proceeds would be deemed to be a fraud upon the rights of the real owner. The seventh subdivision, covering actions to enforce a trust or to compel an accounting where a trustee has neglected his duty or has repudiated the trust relation, would seem to be limited to trusts, express, implied or resulting, growing out of the agreements of parties, or out of the duties and obligations pertaining to some relation of trust assumed by the one charged as a trustee, and does not include purely constructive trusts of the character of that charged against the defendant in this proceeding. This is clearly indicated by the terms used to describe the derelictions of the trustee, which may form the basis of the action, intended to be included within this subdivision, to-wit, 'where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same.' This phraseology is entirely apt when applied to cases wherein an actual trusteeship exists, and the trustee neglects the duty assumed by him, or, after assuming the position, then repudiates the trust relation, or closes up the trust, but fails to properly account for his stewardship, but it is only by a strained construction of the terms that they can be made applicable to constructive trusts that are imposed by the

law, contrary to the will of the one held to account. It is, however, claimed by the defendant that the Supreme Court of Minnesota in the case of Burk v. Association, 40 Minn., 506; 42 N. W. Rep., 479, has expressly ruled that a case similar to that now before the court, wherein it was sought to have the defendant adjudged a trustee of the legal title for the benefit of the plaintiff, was governed by the seventh subdivision above cited, and it is not to be denied that the opinion does so state. The case is very briefly reported, and in view of the language used in other decisions by the same court, including that in the case of Lewis v. Welch, decided in April last, and reported in 48 N. W. Rep., 60, it is not entirely clear that the Supreme Court of Minnesota, whose construction of the statute is, of course, binding upon us, intends to be understood as ruling that cases like the present do not come under the sixth, but only under the seventh, subdivision of section 6 of the statute. If it be held that the seventh subdivision is the clause applicable to the proceeding, then it follows that the bar of the statute is made out, for it is not disputed that the lands were deeded to the defendant company in 1871, and that company has ever since that date claimed to be the owner of the lands, so that more than six years had elapsed since the defendant received the title before the present suit was brought.

"The same result follows, if it be held that the case falls within the provisions of subdivision 6 of the statute. In that event the ruling in Wood v. Carpenter, already cited, would be applicable, and it would be incumbent upon complainant, in order to avoid the bar created by the lapse of six years since the vesting of the title in the defendant company, to show clearly when discovery of the fact was made, and that the company was not in fault in obtaining such knowledge at an earlier day. The fraud sought to be charged upon the defendant is not an actual fraud, or is it one which in any way was concealed or kept secret. The facts show that both companies were claiming these lands. Every step taken by the defendant was, of necessity, made openly and above board. The lands were selected as indemnity lands, belonging to the defendant, and the governor of the state asked in due form that they be so certified. They were certified to the state and by the state were deeded to the defendant. These deeds were entered of record in th counties wherein the lands are situated, and, in fact, every step taken in procuring the same was made part of the public records of the federal and state land departments, which were open to the scrutiny of the public. The lands were offered for sale and sold to various purchasers, who entered into actual and open possession of the premises, and thus notice in every possible way was given to all the world that the defendant claimed the land with full right to sell and dispose of the same.

"In view of the facts disclosed upon this record, it cannot be held that the complainant can escape the bar provided in the sixth subdivision on the ground that it did not discover the facts of the alleged fraud, for, if it was ignorant of the fact of the

transfer of the title of these lands to the defendant, it must have been willfully ignorant, in that it had before it the means of knowledge, and it is not claimed that the defendant practiced any concealment in the premises. The plea that was filed on behalf of the defendant was, in effect, that six years and more had elapsed since the title of the lands had been conveyed to it, and therefore the action was barred by lapse of time. According to the ruling of the United States Supreme Court in Wood v. Carpenter, supra, if the complainant desired to escape the bar by reason of the fact that relief was sought against fraud not discovered until a time within the six years, then it was the duty of the complainant, by proper allegations and proof, to show the existence of actual fraud, concealed from the knowledge of complainant, and, without fault on its part, not discovered until within the six years before the bringing of the suit; and under the ruling of the Supreme Court of Minnesota in Burk v. Association, supra, if there were any facts excusing the delay, the complainant should have pleaded and proved the same. The bill on its face expressly avers that the lands in dispute were selected by the agents appointed by the governor of the state, with the approval of the secretary of the interior, and were certified to the state in aid of, and for the benefit of, the St. Paul & Pacific Company, the predecessor of the defendant company, on the eleventh day of October, 1871, and it is not averred that the complainant or its predecessor had not knowledge of this fact. When the plea of the statute was filed, it was open to complainant to meet it by the averment of any and all facts which would avoid the running of the statute, if any such existed, but no amendment or supplemental bill of amendment thereto was filed, and there is, therefore, upon the face of the pleadings nothing to the contrary of the fact that complainant and all its predecessors had full knowledge of all the transfers of the lands in dispute at the time the same were made.

"The evidence also shows that the entire line of complainant's road was completed by December, 1879, more than six years before this suit was brought.

"Reliance is placed, in argument, upon the testimony of George E. Skinner and W. H. Kelly, who were land commissioners of the complainant company, that they or the company did not have notice of the transfer of these lands to the defendant until in 1883. While these witnesses do in general terms so testify, they wholly fail to explain why they, or the company they represented, did not take interest enough in the matter to make any inquiry about these lands, or to obtain knowledge of their condition in regard to title or occupancy. It does not seem possible that no examination or inquiry in regard to these lands was ever made on behalf of the complainant company for nearly four years after the whole line of road was completed, and for seventeen years after they were granted to the company, according to the present contention. The means of knowledge on part of the complainant were too open and available for it to be credible that the company allowed a period of seventeen years to elapse

after the date of the grant under which it claims, and four years after it had earned all it could under the grant, before any inquiry touching these lands was made in the interest of the company, and even the slightest inquiry or examination would have disclosed the fact that the state and United States authorities had selected and conveyed these lands to the defendant company, deeming that company to be entitled thereto. If, however, it is true that the complainant did not obtain knowledge of this fact until in 1883, as is now claimed, then such want of knowledge was due solely to the inexcusable negligence of the complainant, and ignorance due to negligence cannot be urged as a ground why the bar of the statute should not prevail."

II

THE RIGHT OF APPELLANTS TO RELIEF, IF THEY EVER HAD ANY, IS BARRED BY THEIR LACHES AND BY THAT OF THEIR ANCESTORS.

"Laches is such a neglect or omission to assert a right as, taken in connection with the lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity." "Thus it has been declared with general approval that only conscience, good faith and reasonable diligence can call a court of equity into activity, and that stale demands will not be aided where the party has slept upon his rights or acquiesced for a great length of time. The doctrine is based upon the ground of public policy, and its aim is the discouragement, for the peace and repose of society, of stale and antiquated demands."

12 Ency. of Law, 543, 534.

In respect to laches as applicable to cases where it is attempted to enforce a constructive trust, the doctrine is forcibly laid down by Mr. Lewin in his work on Trusts:

"It is a well-known rule that as between cestui que trust and trustee in case of direct trust no length of time is a bar; for, from the privity existing between them, the possession of the one is the possession of the other, and there can be no adverse title. It has

ence been argued, as the person into whose hands the estate followed is also by construction of law a trustee, the cestui ue trust is entitled to the benefit of the rule, and is not pre- uded by mere lapse of time from establishing his claim. But ie authorities show that this doctrine cannot well be main- ined.

"'It is certainly true,' said Sir W. Grant, 'that no time bars a irect trust; but if it is meant to be asserted that a court of quity allows a man to make out a case of constructive trust at ny distance of time after the facts and circumstances happened ut of which it arises, I am not aware that there is any ground or a doctrine so fatal to the security of property as that would be; o far from it, that not only in circumstances where the length of me would render it extremely difficult to ascertain the true tate of the fact, but, where the true state of the fact is easily as- ertained, and where it is perfectly clear that relief would have riginally been given upon the ground of constructive trust, it s refused to the party who, after long acquiescence, comes into court of equity to seek that relief.' And Lord Redesdale ob- erved: 'The position that trust and fraud are not within the tatute must be thus qualified: That if a trustee is in possession, nd does not execute his trust, the possession of the trustee is the ossession of the cestui que trust; and if the only circumstance s that he does not perform his trust, his possession operates othing as a bar, because his possession is according to his title. But the question of fraud is of a very different description; that s a case where a person who is in possession by virtue of the raud is not, in the ordinary sense of the word, a trustee, but s to be constituted a trustee by a decree of a court of equity, ounded on the fraud; and his possession in the meantime is ad- erse to the title of the person who impeaches a transaction on he ground of fraud.'

"To claims in equity there appear to be three bars arising from apse of time: I. A statute of limitation; II. The presumption f something done which, if done, is subversive of the plaintiff's ight; III. The ground of public policy or the inconvenience of he relief."

2 Lewin on Trusts, bottom page 1158 et seq.

"The court, after a great length of time, will presume some act o be done, which, if done, is a bar to the demand.

"Though the plaintiff's demand cannot be met by an absolute bar, and no release of right can be presumed, yet, thirdly, relief will not be granted where, if administered, it would lead to great public or private inconvenience."

2 Lewin on Trusts, pp. 1167-1169.

"Lapse of time or delay in suing, unaccounted for by disability or other circumstances, constitutes per se, in the eye of a court of equity, laches disentitling the plaintiff, in certain classes of

cases at least, to relief from the court. Thus where a plaintiff cestui que trust seeks to impeach a purchase by a trustee, a delay of less than twenty years may bar his title to relief. So where a plaintiff seeks to set aside a purchase from him by his solicitor, or of a revisionary interest, or to affix a defendant with a constructive trust, or to call a person to account for acts of waste, or comes to a court of equity alleging a cause of fraud as a ground for avoiding the operation of the statute of limitations. So where an account was sought by a surviving partner against the estate of a deceased partner, the court, even assuming such case to fall within the exception as to merchant's accounts in the statute of limitations, refused its aid after a delay of thirteen years. And where the assistance of the court is sought in a suit for specific performance, or in one partaking of that character, the rule is extremely strict. It is difficult to refer the refusal of the relief by the court, in the instances mentioned, to any one general principle. In the cases of purchases by trustees, or of claims founded upon constructive trust, the probability of alteration of circumstances in regard to the property, and the unfairness of the plaintiff in lying by, have weighed with the court. Perhaps the nearest approach to general principle will be found under the head of 'Public Convenience:' 'Expedit Republicae ut sit finis litium.'"

2 Lewin on Trusts, pp. 1169-1171.

Laches has been held to be a bar in nearly every conceivable case falling within the general doctrine in the following decisions:

Burk v. Western Land Assn., 40 Minn., 506.

Ry. Co. v. Sage, 1 U. S. C. Ct. of Appeals, 256.

Wagner v. Bird, 7 How., 234.

U. S. v. Moore 12 How., 209.

Badger v. Badger, 2 Wall., 307.

Godden v. Kimmell, 99 U. S., 201.

Crosby v. Beall, 17 Wall., 336.

Russel v. Trans. Univ., 1 Wheat., 432.

McQuiddy v. Ware, 20 Wall., 14.

Marsh v. Whitman, 21 Wall., 178.

Kirby v. McGlynn, 21 Wall., 503.

Fletcher v. Fisher, 120 U. S., 534.

Felix v. Patrick, 145 U. S., 317.

McKnight v. Taylor, 1 How., 161.

Brown v. Buena Vista Co., 95 U. S., 157, 160-161.
Speidel v. Henrici, 120 U. S., 377.
Speidel v. Henrici, 15 Fed., 753.
Richards v. Mackall, 125 U. S., 183.
Elmendorf v. Taylor, 10 Wheat., 152.
Boon Co. v. Burlington R. R. Co., 139 U. S., 684, 692-3.
Herwood v. R. R. Co., 17 Wall., 78, 80, 81.
Holgate v. Eaton, 116 U. S., 33, 39.
Mackall v. Casilear, 137 U. S., 556, 566.
U. S. v. Flint, 4 Sawyer, 58.
Fuller v. Melrose, 1 Allen, 166.
Peabody v. Flint, 6 Allen, 52.
Royal Bank v. Grand Junc. R. R. Co., 125 Mass., 490, 494-5.
U. S. v. Beebee, 17 Fed. Rep., 36.
Campau v. Van Dyke, 15 Mich., 378.
Wilbur v. Flood, 16 Mich., 40.
Hubbardston Lumber Co. v. Bates, 31 Mich., 158, 168.
Follamsbe v. Kilbreth, 17 Illinois, 522.
Evans v. Bacon, 99 Mass., 213.
Learned v. Foster, 117 Mass., 365.
Ashurt's Appeal, 60 Pa. St. Rep., 290, 315, 316, 317, 320.
Evans' Appeal, 81 Pa. St., 278, 300, 303.
Kane v. Bloodgood, 7 John Ch., 90, 113.
Leavenworth v. Chicago, 18 Fed. Rep., 209.
Foster v. Mansfield, Coldwater & Lake Mich. R. R. Co., 146 U. S., 88.
Johnson v. Standard Mining Co., 148 U. S., 360.

In Mayward v. National Bank, 96 U. S., 611, it was sought to set aside a sale of certain stocks, for an accounting, etc. The sale alleged to be void or voidable was made three years and a half before the commencement of the action, during which time the complainant made no claim that the sale was invalid. The bill was dismissed on the ground of complainant's laches and because the parties could not be placed in statu quo. The court said:

"The facts present insuperable obstacles to any decree in favor of the appellant. If the sale made by the bank was originally impeachable by him, the right to question its validity was lost by his acquiescence. He was in a condition, immediately after the sale, to enforce such rights as the law gave him, as he was fully apprised of their nature, and of all the material facts of the case. He now claims that the sale was in derogation of his rights and injurious to his interests; and yet his conduct was uniformly inconsistent with any purpose to repudiate the sale or assert ownership of the stock. His course was continuously such as to induce a reasonable belief of his fixed determination to abide by the action of the bank. He remained silent when he should have spoken. He will not be heard now, when he should be silent. He must be held to have waived and abandoned the right, if any he had, to impeach the transaction of September 8, 1868. But the appellant is equally concluded by the lapse of time during which that transaction has been allowed to stand, without any effort upon his part to impeach it. It must now be regarded as unimpeachable. Courts of equity often treat a lapse of time less than that prescribed by the statute of limitation as a presumptive bar, on the ground of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right."

Laches is a bar, in cases where the parties cannot be restored to their original possession. Peabody v. Flint, 6 Allen, 52, 67.

In Campau v. Van Dyke, 15 Mich., 378, it was sought in equity to avoid a decree establishing a title to real estate six years and a half after the right of action accrued. The bill was dismissed as not brought within a reasonable time.

In Brown v. Buena Vista Co., 96 U. S., 157, the suit was to enjoin the enforcement of a judgment alleged to have been procured by fraud and conspiracy. The statute of limitations of Iowa, in which state the suit was brought, barred such an action within five years after the discovery of the fraud. The statute had not run, yet the court dismissed the bill, saying:

"The statute of limitations of Iowa of five years, perhaps, does not apply, because the fraud, if it existed, was not known sufficiently early. The statute could run only from the time of the discovery. But the court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court. Sullivan v. Portland & Kennebec R. R. Co., 94 U. S., 806. The facts in this connection to which we have adverted are entitled to grave consideration.

"Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. When these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this court.

"The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

In Godden v. Kimmell, 99 U. S., 201, the court says:

"Relief in such cases may be sought; but the rule is that the cestui que trust should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights and the means used by the respondent to keep him or her in ignorance and how he or she first came to a knowledge of their rights."

In Marsh v. Whitmore, 21 Wall., 178, 184, 185, it was sought to enforce an accounting from an attorney for the proceeds of certain bonds of a client, which he had sold and bid in for himself twelve years before the institution of the suit. The court refused the relief, and in doing so observed:

"At any rate, the claim now presented is a stale one. The complainant does not set forth specifically any grounds which could have constituted impediments to an earlier prosecution of his suit. He does not even inform us when he first became acquainted with his supposed wrongs. His language is that he was not aware of the purchase by the defendant until lately, language altogether too vague to invoke the action of a court of equity. 'The party,' says this court, in Badger v. Badger, citing from previous decisions, 'who appeals to the conscience of the chancellor in support of a claim, where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse rights, should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fradulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.'"

In Richards v. Mackall, 124 U. S., 183, the court dismissed a bill brought twelve years after the purchase which it sought to

avoid, and, in doing so, observed as follows, after stating the rule laid down in Badger v. Badger, 2 Wall., 87, 95:

"So in Sullivan v. Portland, etc., R. R. Co., 94 U. S., 806, 811: 'To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation be laid by any averment in the answer of defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief.' In the latter case, it was said that equity would sometimes refuse relief where a shorter time than that prescribed by the statute had elapsed without suit."

In Speidel v. Henrici, 120 U. S., 377, the court held:

"In case of an implied or constructive trust, unless there has been fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law," and adds, "independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them."

Ashurt's Appeal, 60 Pa. St., 290, was a suit to adjudge the defendant a trustee and for an accounting. Mr. Strong, afterwards Justice Strong, of the Supreme Court, acting as referee, held as follows:

"In all cases in which an attempt is made to fasten a constructive trust upon a purchaser, the attempt must fail unless made in a reasonable time. Acquiescence is presumed from delay. Lapse of time, indeed, is no bar to the assertion of a direct trust, but not so when the trust is constructive. If a trustee to sell becomes the purchaser, his purchase is generally voidable, but the cestui que trust must move to avoid it within a reasonable time. Campbell v. Walker, 5 Ves., 678; Hawley v. Kramer, 4 Cowen, 718; Prevost v. Gratz, 1 Peters, C. C. Rep., 368; Clegg v. Edmundson, 3 Jur. N. S., 299. This last case is instructive in many particulars. In Beckford et al. v. Wade, 17 Ves., 87, Sir William Grant said: 'It is certainly true that no time bars a direct trust as between cestui que trust and trustee; but if it is meant to be asserted that a court of equity allows a man to make out a constructive trust, at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be; so far from it that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would have been given upon the ground of constructive trust, it is refused to the party who, after long acquiescence, comes into a court to seek that relief. In proof of this it is not necessary to produce any other case than

which Lord Kenyon, when master of the rolls, on the sole ground of length of time, reversed a decree by which Sir Thomas Sewell had granted relief against a fraudulent purchase, and had declared a purchaser to be a trustee for the plaintiff in the cause, Lord Kenyon agreeing perfectly that the purchase was originally fraudulent, and that defendant must have been held to be a trustee if the suit had been brought in proper time.' To this effect the cases are very numerous. It would extend my remarks much too far to cite them. They are all sustained by the principle that equity presumes against the existence of a trust unless it be asserted within a reasonable time. The principle is essential to the security of property. It is in harmony with the course of human conduct generally, and it is in most cases accordant with the actual fact. But what is the reasonable time within which a constructive trust must be asserted? The cases do not clearly define it, and perhaps it is incapable of strict definition. It must vary with the circumstances of each case. For myself, I think it may safely be laid down that when a party claims to hold another, a trustee of personal property under a constructive trust, he must assert the claim within six years from the time when the trust is alleged to have originated, in analogy to the statute of limitations. He cannot be permitted to make the assertion afterwards. This, I think, should be regarded as a general rule. There may be cases when even six years cannot be allowed, as when a party having a right to set aside a transaction or treat it as a trust stands by and sees another dealing with the property in a manner inconsistent with any trust, and makes no objection. Duke of Leeds v. Amherst, 2 Phill., 123; Jordan v. Moiney, 5 H. L. C., 185. And so when the rights of third persons may have intervened. So also where the property is of a peculiar kind, and the alleged trustee, in ignorance of any intention to hold him to an account, relying upon his ownership, enters upon a hazardous business or incurs large responsibilities. At least this is true when the alleged constructive trust does not grow out of actual or intended fraud. It has often been said that equity obeys the statute of limitations, and it has been held that laches for a much shorter period than six years, aided by other circumstances, will bar a right."

It will be observed that six years was the limitation prescribed by the laws of Pennsylvania to such suits, and the court held that statute to be a bar in equity. The Supreme Court of that state says:

"After a very careful examination of this case, with reference to the facts and law involved, and the arguments of counsel, we are unable to discover error in any of the conclusions arrived at by our brother, Strong, J., who heard it at great length at Nisi Prius; we, therefore, affirm the order dismissing the bill of the complainants with costs, for the reasons stated in the opinions of the learned judge."

In Evans' Appeal, 81 Pa. St., 278, it was sought to establish a constructive trust. The bill was filed four years and a half after the transactions sought to be avoided. The court held it barred. Justice Mercur, delivering the opinion of the court, said:

"Hence, since the plaintiffs had full knowledge, new business arrangements have been made and other rights have intervened. The proceedings were delayed, under the attending circumstances, an unreasonable time. Having been so delayed, the laches is fatal to the plaintiff's bill." Page 302.

A delay which might be immaterial in ordinary cases will bar relief in instances where the property is subject to contingencies or fluctuations in value, or when the rights or liabilities of others, or even of the alleged wrong-doer, have in the meantime varied.

Hayward v. National Bank, 96 U. S., 611, 618.

Baker v. Houck, 36 Fed. Rep., 403.

It is to be borne in mind, in considering the case at bar, that there has been no attempt by any of the defendants, or their predecessors, to conceal their claim or any fact upon which it is based. No such charge is made; everything has been open and public and the plaintiffs are presumed to have had notice and knowledge.

Leavenworth Co. v. Chicago Co., 18 Fed. Rep.,209.

It was held by the Supreme Court, in Badger v. Badger, 2 Wall., 87, 92, that in order to obtain relief in equity,

1st. The trust must be clearly established.

2d. The facts must have been fraudulently and successfully concealed by the trustee from the knowledge of the cestui que trust.

The court observes:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how came he to be so long ignorant of his rights and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.

"The bill in this case is entirely defective in all these respects. It is true there is a general allegation that the fraudulent acts

were unknown to complainant till within five years past, while the statement of his case shows clearly that he must have known, or could have known, if he had chosen to inquire, at any time in the last thirty years of his life, every fact alleged in his bill."

Tested by this rule, which, as we have seen, has been reiterated by this court in several subsequent decisions, the allegations in the bill in the case at bar are fatally defective, nor are they aided by the proofs. The allegation in the bill is that "neither the heirs nor their predecessors in interest, except the said Elizabeth Wetzel, at the time of the alleged assignment of said land warrant or at any time thereafter, knew of such sale, and they remained in absolute ignorance thereof and also in absolute ignorance of any such a land warrant or any land warrant whatever having been issued to them or to their father or their guardian, and also in absolute ignorance that their father ever became entitled to any such land warrant or any land warrant whatever. That not until August, 1891, did they or their predecessors acquire any knowledge," etc.

In Burk v. Western Land Association, 40 Minn., 506, the court, after holding the case barred by the statute of limitations, said:

"We might add that, independently of any statute of limitations, the laches of the plaintiff in delaying this action almost thirty years was so gross and so entirely unexcused, that no court would ever grant the relief; and in equity the rule of pleading was, if the case of the plaintiff, as stated in the bill, will not entitle him to a decree, it might be taken advantage of by demurrer."

In Goodnow v. Empire Lumber Co., 31 Minn., 468, an infant, fifteen years old, being married, conveyed real estate Nov. 27, 1857. She died Dec. 16, 1867, and her husband died Nov. 10, 1874. Plaintiffs, her children, gave notice of disaffirmance of the conveyance March 22, 1883. The disability of infancy of their mother, the grantor, ceased April 21, 1863. For four years and eight months before she died she was free of the disability of infancy, and for one year and four and one-half months she was free of the disability of coverture.

The court held that her delay of three and one-half years was unreasonable, and barred the right of the heirs to disaffirm her deed, saying:

"In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That ten, fifteen, or twenty years, or such other time as the law may give for bringing an action, is necessary as a matter of protection to him, is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule, which is solely protection to the infant. Reason, justice to others, public policy (which is not subserved by cherishing defective titles), and convenience, require the right of disaffirmance to be acted upon within a reasonable time."

In Wagner v. Baird, 7 How., 234, it was sought to enforce a claim under a voluntary settlement, after a lapse of more than forty years, and where a great change of value in property had taken place, partly attributable to the expenditure of the defendants and those under whom they claimed, and no fraud was charged. It was held that the claim was stale and that the court would not enforce it. The court said:

"The court of equity will not give relief against conscience or public convenience, where a party has slept upon his right. 'Nothing,' says Lord Camden, 3 Bro. Chr., 640, 'can call forth this court into activity but conscience, good faith and reasonable diligence. When these are wanting the court is passive, and does nothing.' Length of time necessarily obscures all human evidence and deprives parties of the means of ascertaining the nature of the original transaction; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. The party guilty of such laches cannot screen his title from the just imputation of silence, merely by the allegation of an actual impediment or technical disability. * * * No bad faith, concealment or fraud can be imputed to them. If the trustees or cestui que trust chose to reside in Kentucky and not look after these lands, for near half a century, they can have no equity from a disability that was voluntary and self-imposed. The residence of the trustees in Kentucky was not considered as an obstacle or objection in the minds of those who executed the deed to their assuming the trust and care of lands in Ohio. There was no greater impediment to the prosecution of their claim in a court of

equity at any time within forty years than there is now. They have shown nothing to mitigate the effect of their laches and long acquiescence, or which can entitle them to call upon a court of equity to investigate the fairness of the transactions, after all the parties to them have been so long in their graves, or grope after the truth and facts involved in the midst of obscurity consequent on the lapse of nearly half a century."

We have elsewhere cited St. P., S. & T. F. Ry. Co. v. Sage, 1st U. S. C. C. of Appeals, 160, in support of the plea of the statute of limitations. The court in that case, after applying those statutes as a bar, proceeds at great length to hold the action barred by laches. After laying down the general principle, it observes:

"But aside from considerations of this nature, it is clearly apparent that the money interest of the defendant and others holding under it would be disastrously affected by entertaining the present bill at this late date. * * * The equitable rule that one who is negligent shall not have relief, and the barring of proceedings after the lapse of stated periods of time by statutory enactments, are alike based upon public policy as well as upon constructions affecting only individual rights. It is to the public interest that stability in the title to property should exist and that all uncertainties and disputes as to ownership of land should be speedily put at rest. No greater evil to the community at large can well be imagined than that caused by the attacks upon the title to large bodies of land which have been for years in the actual possession of bona fide settlers, thus weakening the public confidence in the recognized and established evidences of title. It is greatly to the welfare of the community that realty shall be improved to the best advantage and rendered as productive as possible, and yet these results cannot be expected if the parties in possession are in doubt whether if they sow they will be permitted to reap the harvest."

McKnight v. Taylor, 1 How., 161, was a case of an express trust created in favor of creditors, under which one had a right to require sale of property and payment of his debts, in 1818. He slept upon his rights until August, 1837, and failed to account for his delay. There was no statutory limitation, but it was held that the claim to have the trust executed was stale and would not be enforced in equity.

Elmendorf v. Taylor, 10 Wheat., 152, was a suit brought to obtain a conveyance of land held by the defendants under a prior grant, and under entries which were also older than the entry of the plaintiff. Defendants did not adduce evidence of their interest, but relied upon their patent. The patent was

issued February 11, 1794; those of the defendants at a prior dat and the bill was filed in 1815.

The court, speaking by Chief Justice Marshall, held, after di cussing the subject fully, that the delay constituted a comple bar to the bill, saying as to laches and the statute of limitation that:

"From the earliest ages courts of equity have refused the aid to those who have neglected for an unnecessary length time to assert their claims especially where the legal estate ha been transferred to purchasers without notice and although th statutes of limitations do not either in England or in these state extend to suits in chancery, yet the courts in both countries hav acknowledged their obligations. Their obligations, we believ have never been controverted. * * *

"This is not an express trust. The defendants are not, t use the language of the Lord Chancellor in the case last cite strict trustees, whose duty it is to take care of the interests the cestui que trusts, and who are not permitted to do anythin adverse to it. They hold under a title in all respects adversar to that of the plaintiff, and their possession is an adversary po session. In all cases where such a possession has continued fo twenty years, it constitutes, in the opinion of this court, a com plete bar in equity. An ejectment would be barred, did th plaintiff possess a legal title."

In Harwood v. Ry. Co., 17 Wall., 78, a bill was filed to set asid certain fraudulent judicial proceedings, five years after the completion. The bill was dismissed upon the ground of laches.

In The United States v. Beebee, 17 Fed. Rep., 36, the doctrin of laches was applied against the United States, in a suit brough by it to set aside certain patents asserted to have been fraud lent, and against the claims of certain heirs, which it allege were unlawfully and fraudulently set aside by the action of th land department some forty-three years before the filing of th bill.

In McKinney v. Bode, 33 Minn., 450 M. in 1872 purchased ce tain school lands, paid part of the purchase price, received certificate, went into possession, built a house and remained i possession until December, 1873, when he executed an assig ment of the certificate to his wife, abandoned the land and h wife and family and never afterward assumed possession. Th wife and a son who remained with her from the date of suc abandonment paid the taxes and the interest on the unpa

purchase money until the death of the wife in 1880, and after her death on account of the estate. The administrator of her estate, under license, sold and assigned the certificate to A., who paid to the land commissioner all unpaid purchase money and received a patent. M. brought suit against a purchaser claiming under conveyance from the patentee. The court said:

"Until the patent issued, the legal title remained in the state. Gen. St. 1876, ch. 38, sec. 12. The certificate gave the purchaser a right to the possession of the land (sec. 17), and by complying with its terms he would become entitled to a conveyance of the legal title. In this respect it was in effect similar to an ordinary contract for purchase, with perhaps this difference: That a default in its conditions would absolutely terminate all rights under it. It became functus officio on the issuance of the patent. The patent, when regular on its face—that is, when it is in proper form, is signed by the proper officers, and has the proper seal—is conclusive evidence of the legal title. Johnson v. Towsley, 13 Wall., 72; Gibson v. Chouteau, Id., 92; Boardman v. Reed, 6 Pet., 328; Green v. Liter, 8 Cranch, 229; U. S. v. Arredondo, 6 Pet., 691, 724; Patterson v. Tatum, 3 Sawy., 164; Pacific Coast Min. & Milling Co. v. Spargo, 8 Sawy., 645; S. C., 16 Fed. Rep., 348; Sherman v. Buick, 93 U. S., 209.

"The purchaser is not required to look behind it; all the incipient steps authorizing the officers to issue it are presumed to have been regularly taken. It cannot be avoided (in a collateral action, at any rate) for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from the commencement to its consummation in a patent. Polk's Lessee v. Wendal, 9 Cranch, 87; Lea v. Polk Co. Copper Co., 21 How., 493; Johnson v. Towsley, supra. It is conclusive proof of the act of granting by the state. U. S. v. Arredondo, supra. But it may be defeated, even in an action at law, by showing want of title in the state, or absolute want of power in the officers to issue it. Polk's Lessee v. Wendal, supra; Sherman v. Buick, supra. It would certainly be contrary to public policy to permit a patent, which is issued by sworn officers, and is deemed of so high a character, as evidence of title, as sometimes to be designated as of 'absolute verity' (U. S. v. Arredondo) to be assailed by every one, in every kind of proceeding, for irregularities of officers issuing it, for which the patentee is in no way responsible. * * *

"Did this plaintiff show such supperior equities? The bare statement of the foregoing facts indicates the proper answer. Seven years before the patent issued he abandoned the land and gave up the design to become himself entitled to a patent: abandoned, in fact if not in law, all interest in the matter. Had nothing been done but what he did, all rights under the certificate would have been forfeited six years before the patent issued. Others, by performing its conditions, kept it alive, not acting upon his procurement nor for him, nor intending what he did

to be for his benefit, but acting in their own behalf, for their own interest, and upon the notion (grossly mistaking the law) that the legal interest in the certificate had passed by his assignment to Mrs. McKinney. And after the patent was earned and issued, he seeks to appropriate the benefit of what was done by those who earned it, taking his stand solely on the naked legal proposition that his attempted assignment to Mrs. McKinney was void. There is no equity in that."

In Murphy v. Burke, 47 Minn., 99, a person who had received a certificate of sale of school lands, in 1872, assigned the certificate in 1875, and his assignee in 1880 assigned it to one Mitchell. From 1880 to 1890, when Mitchell assigned the certificate to the plaintiff and quitclaimed to him, he, Mitchell, never paid any interest on the certificate or taxes and never gave any attention to said premises or asserted any interest therein. In the meantime, in 1887, the lands were sold at tax sale to the state. No redemption having been made, Burke, having become the purchaser under the tax sale from the state, applied, in 1886, to the state land commissioner to make payment of interest due (being for more than ten years) on the certificate, and paid said interest, and then a few days afterwards paid to the state all the principal and interest then remaining due on the certificate, and thereupon received a patent. The premises by this time had grown to be worth $96,000. The plaintiff in 1890 brought suit to hold Burke as trustee. The tax sale under which Burke claimed was void. The court said:

"The action is brought on the theory that plaintiff's assignor, Mitchell, was equitably entitled to the patent issued to Burke, and that the latter received, and his grantees hold, the legal title in trust for Mitchell and the plaintiff, his grantee.

"The validity of the tax judgment and sale is assailed on the grounds that, the county commissioners not having properly designated a newspaper in which to publish the tax list and notice, the court had not jurisdiction to render the judgment (though we think this objection not well founded), and that the sale certificate does not properly describe the lands.

"If the tax sale were valid, that, of course, would be decisive of the case, for, in that event, the purchaser from the state would have been in law the successor in interest of the person to whom the school land certificates issued. But it does not follow that, if the tax sale was void, the plaintiff would be entitled to judgment. In McKinney v. Bode, 33 Minn., 450 (23 N. W. Rep., 851), the person to whom the patent issued claimed and had acted under an absolutely void assignment of the school land certifi-

cate, yet we held that the patentee was entitled to retain the land.

"The plaintiff also assigns as error that the finding of fact that Mitchell had abandoned all claim to the premises is not sustained by the evidence, in this: That there is no evidence of the assessment of taxes after those paid by Culver. It is not claimed that, at any time prior to the assignments by him to plaintiff, Mitchell ever made any effort to ascertain if there were taxes to be paid, and there was some evidence that he did not. As, during a part of the time, at least, the lands were subject to taxation, and as they were taxed for some of the years, as shown by the judgment, it was a fair inference that Mitchell gave no attention to the matter so far as the taxes were concerned. There was no pretense that, during the more than ten years after Culver assigned the certificates, any one gave any attention to the interest accruing annually on them, although by their terms they were to become utterly void upon a default for more than six days. This conduct, explained by the merely nominal prices for which the certificates were assigned to Mitchell—only a dollar and a half for the three; by the fact that at that time there was, in form at least, a tax judgment and tax sale against the land, and the time for redemption expired, and there being nothing to suggest any other reason for it—leads irresistibly to the conclusion that Mitchell did not deem it worth while to attempt to secure the lands by complying with the terms of the certificates, and getting rid of the tax judgment and sale, perhaps by litigation, and that, if he ever had any intention to so secure the lands, he abandoned it. The subsequent enormous increase in the value of the lands suggests a reason for the attempt to revive or resume it. The evidence fully sustains the finding.

"We may concede that the tax sale was void, yet it is apparent that it was an important element in the transactions, just as the void assignment in the Bode case was. It undoubtedly induced action on the part of the person who complied with the law in respect to school land certificates, and obtained the patent. There can be little doubt that it had influence with Mitchell in preventing his taking any steps to secure the lands under the certificates, and it must have been considered valid by the land commissioner when he issued the special certificates. The title of the patentee and his grantees is unassailable, except by one who shows an equitable right to receive the patent superior to the equity of the patentee, so that the issuance of it to, and the retention of the legal title by, the latter operates as a fraud upon him.

"Unless one shows such superior equitable right, it is no concern of his that the patentee was or was not legally entitled to receive it. The question is not, therefore, did the tax sale transfer the legal right under the school land certificates, but, assuming it to have been void, so that the legal title to the certificate was not affected, was the equity of the legal owner of them, who, for more than ten years before they became functus officio by the issuance of the special certificates, utterly neglected

to do anything that they required, and abandoned the intention to comply with them and secure the land, superior to that of the one who, acting upon the faith of the tax sale, performed what the certificates and the law required, and so earned the patent? No argument is required to show that it was not. The case is not distinguishable from the case of McKinney v. Bode."

We confidently submit that the decision in Felix v. Patrick, 145 U. S., 317, is decisive of the case at bar. In that case Sophia Felix, an Indian half-breed, was entitled to and received certain scrip, amounting to 480 acres, locatable upon any unoccupied land. By express provision of statute no transfer or conveyance of such scrip was valid. Some person obtained possession of this scrip to the amount of 120 acres from her and her husband, and took from them a power of attorney and a quit-claim deed, bearing date March 31, 1860, executed in blank. Two years afterwards these were turned over by some one to Patrick, who located the scrip upon what is now a part of the City of Omaha. A large part of the tract had, before the commencement of the suit, been platted, divided into lots, sold to purchasers, whose only notice of the infirmity of their title was the fact that the power of attorney and quit-claim deed were dated nearly two years prior to the scrip location. In 1887 the heirs of Sophia Felix, then deceased, brought a suit in equity in the United States Circuit Court, charging fraud in the transaction by which she parted with the scrip, and seeking to have Patrick declared a trustee as to all the lands that he had not disposed of, and to impose upon his grantees the same liability. The court held that upon these facts Patrick originally took the lands as trustee for said Felix, but that he did not take them under express trust to hold for her benefit, but under the implied or constructive trust created by operation of law and arising from the illegal practices resorted to in obtaining the power of attorney and deed, and under which, after the scrip was located, Patrick derived his title. Patrick did not take possession under any acknowledged obligation to her, but he located for his own use and benefit, and his possession in the beginning was held by the court to have been adverse to hers. The court said:

"Under such circumstances the law raises an obligation upon the part of the cestui que trust to make use of reasonable diligence in discovering and unearthing the fraud and in applying to the courts for legal redress. In this case twenty-eight years elapsed from the time the scrip was procured of Sophia Felix, and nearly twenty-seven years from the time it went into possession of Patrick, before the bill was filed. It admits of no doubt that if Sophia Felix and these plaintiffs had been ordinary white citizens, under no legal disabilities such as those arising from infancy, lunacy or coverture, this lapse of time would be fatal to the recovery, at least unless it were conclusively shown that knowledge of the fraud was not obtained, and could not, by reasonable diligence, have been discovered within a reasonable time after it was perpetrated."

To obviate the defense of laches the plaintiffs insisted that Sophia Felix and her heirs were and continued to be until 1887 tribal Indians of the Sioux nation, under certain disabilities to make contracts, and incapable of suing in any of the courts of the United States. Recognizing the force of this argument, the court said:

"But their very analogy to persons under guardianship suggests a limitation to their pupilage, since the utmost term of disability of an infant is but twenty-one years, and it is very rare that the relations of guardianship and ward, under any circumstances, even those of lunacy, are maintained for a longer period than this. It is practically admitted in this case that in 1887 and when their relations with their tribe were severed by accepting allotments of land in severalty, under the treaty of April 29, 1878, they became citizens of the United States; that they were then chargeable with the same diligence as white people in the discovery of this fraud; and as their bill was filed in 1888 it is claimed that they fulfilled all the requirements of law in this particular. While, as alleged in the bill, the discovery of this fraud may have been contemporaneous with their becoming citizens of the United States, there is no palpable connection between the one fact and the other, and we think the bill is defective in failing to show how the fraud came to be discovered and why it was not discovered before. A simple letter to the land department at any time after this scrip was located would have enabled them to identify the land and the name of the person who had located it, and it is difficult to see why, if they had ever suspected the misuse of this scrip, they had not made inquiries long before the time they did, or why their emancipation in 1887 should have suddenly awakened their diligence in this particular. There is, it is true, an averment that Patrick never informed the said Sophia or her husband that he had located said scrip, but on the contrary fraudulently concealed the same and exercised every precaution to prevent such proceedings coming to the knowledge of the party. But no acts of his in this connection are averred in the bill, and we are left to infer that his concealment was that of mere silence, which is not enough."

The court approves the rule of pleading to excuse laches cited ante from Badger v. Badger, 2 Wall., 94, and proceeds:

"Sophia Felix and her husband must have known that she had parted with the scrip, yet she lived until 1865 and her husband till 1882 without apparently making any attempt to discover what had become of it. Nor did their heirs apparently make any effort to discover it until 1887, when their intelligence seems to have suddenly sprung into activity upon their becoming citizens of the United States. * * * It was said by this court, in Wood v. Carpenter, 101 U. S., 135, 140, that in this class of cases the plaintiff is held to stringent rules of pleadings and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery was, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.

"See also Stearns v. Page, 7 How., 819, 829.
"Wollensak v. Reiher, 115 U. S., 96.
"Godden v. Kimmell, 99 U. S., 201, 211.

"The mere fact that in 1887 these plaintiffs took their lands in severalty and became citizens does not adequately explain how they so quickly became cognizant of this fraud or why they had remained so long in ignorance of it.

"But, conceding that the plaintiffs were incapable, so long as they maintained their tribal relations, of being affected with laches, and that these relations were not dissolved until 1887, when they were first apprised of their right to this land, it does not necessarily follow that they are entitled to the relief demanded by this bill. The real question is whether equity demands that a party who, twenty-eight years ago, was unlawfully deprived of a certificate of muniment of title of the value of $160 shall now be put in possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous. In a court of equity at least the punishment should not be so disproportionate to the offense, and the very magnitude of the consequences in this case demands of us that we should consider carefully the nature of the wrong done by the defendant in acquiring the title to these lands. He is not charged in the bill with having been a party to the means employed, the obtaining the scrip from Sophia Felix, or of being in collusion with the unknown person who procured it from her. More than that the allegations of this bill do not satisfy us that she did not receive full value for the scrip. * * *

"However this may be, taking all the allegations of this bill together, it is very evident that Patrick bought these muniments of title as hundreds of others bought them—in violation of the letter and policy of the law, but without actually intending to defraud Sophia Felix or any other person. This transgression the law pronounces a fraud upon her, but it lacks the element of wickedness necessary to constitute moral turpitude. If there

had been a deliberate attempt on his part of knavish practice, to beguile or wheedle her out of these lands, we should have been strongly inclined to afford the plaintiffs relief, at any time during the life of either of the parties, but, as the case stands at present, justice requires only what the law in the absence of the statutory limitation would demand—the repayment of the value of the scrip, with legal interest thereon. * * *

"There are other considerations which require to be noticed in this connection. By the foresight and sagacity of this defendant, this scrip was located upon lands within the limits of one of the most thriving and rapidly growing cities of the West. That which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases. The bill charges all these with notice of the defect in Patrick's title and prays that the conveyances to them be declared null and void and that plaintiffs be admitted into possession of their lands, and that Patrick account for rents, profits and issues, so far as he has received them. If the views put forward in their brief be correct, that these instruments were of no greater effect than if they had been forgeries, it is difficult to say how these transfers can be supported, and it needs no argument to show that the consequences of setting them aside would be disastrous. Certainly if they were not entitled to the lands themselves, they would be entitled to recover of Patrick what he had received for them. Waiving this question, it is scarcely within the bounds of possibility to suppose that Sophia Felix, if she had located this scrip, would have realized title of the sum her heirs now demand of this defendant. The decree prayed for in this case, if granted, would offer a distinct encouragement to the purchase of similar claims, which doubtless exist in abundance through the Western territories (Felix herself having received scrip to the amount of 480 acres, only 120 of which are accounted for), and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation."

In Foster v. Mansfield, Coldwater & Lake Michigan Railroad Company, 146 U. S., 88, this court says (p. 99):

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

In Johnson v. Standard Mining Co., 148 U. S., 360, this court observes (p. 370):

"While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the

title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. This principle was applied at the present term of this court in Foster v. Mansfield, etc., Railway, 146 U. S., 88, to a case where a stockholder in a railway company sought to set aside a sale of the road which had taken place ten years before, when the facts upon which he relied to vacate the sale were of record and within easy reach. See also Wood v. Carpenter, 101 U. S., 135, 141; Kennedy v. Green, 3 Myl. & K., 699, 722; Buckner v. Calcote, 28 Mississippi, 432; Cole v. McGlathry, 9 Maine, 131; McKown v. Whitmore, 31 Maine, 448.

"The duty of inquiry was all the more peremptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. A property which, in October, 1880, plaintiff sold to Chatfield upon the basis of $4,800 for the whole mine is charged, in a bill filed October 21, 1887, to be worth $1,000,000, exclusive of its accumulated profits. Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights. Felix v. Patrick, 145 U. S., 317, 334; Hoyt v. Latham, 143 U. S., 553, 567; Hammond v. Hopkins, 143 U. S., 224; Great West Mining Co. v. Woodmas Mining Co., 14 Colorado, 90."

See also Naddo v. Barden (U. S. Cir. Ct. of Appeals), 51 Fed. Rep., p. 493, per Brewer, Justice.

This case involved a portion of the site of the City of Duluth and is quite analogous to the case at bar. The suit was brought seventeen years after the cause of action accrued. To excuse the delay plaintiff averred that for ten or twelve years he had lived in Canada, and that "until recently he had not learned that the transfers sought to be avoided," had been made, and that for ten years the attorney and others claimed that he had lost his rights in the land and that until recently he had been too poor to enforce them.

Held that he was guilty of laches, which the allegations of the bill did not sufficiently excuse.

Were there no testimony on the point, the court would presume that the family of George W. Remsen knew, many years ago, as a matter of family history, the fact that he was a soldier in the Mexican war at the time of his death. It is also a strict presumption of law that they knew, and were bound to know, all of the property rights conferred upon him by law, by virtue of his military service and as the result of his death. But the testimony makes it clearly apparent that the children of George W. Remsen, and his grandchildren, had knowledge, many years before this suit was commenced, of his military service and death.

Harriet A. Remsen was seventeen years old when the warrant was issued and became twenty-one years of age in 1852; Mary Ann Remsen became twenty-one in 1856; John Wesley Remsen became twenty-one in 1858; Elizabeth Remsen became twenty-one in 1861; George W. A. Remsen became twenty-one in 1863; Mary Ann Remsen, J. W. Remsen and G. W. A. Remsen died, respectively, in 1862, 1878 and 1882, all many years over twenty-one. The complainants, Hergesheimer and Beckman, are the children of Mary Ann Remsen, who was born in 1835 and died in 1882. Mary Remsen is the widow of George W. Remsen. Clara B. Remsen and Mabel Remsen are the children of George W. A. Remsen, who was born in 1842 and died in 1878.

Elizabeth Wetzel testifies that she had a lawyer to get her husband's wages; that she got a pension certificate and the lawyer got the land warrant (p. 39, fol. 67 et seq.), and told her he had it; that she went one evening and assigned the land warrant; that Harriet went with her and that she received payment for the warrant, but cannot remember the amount, whether it was $100 or not; that she told Harriet to sign the assignment; that she thought she ought to (p. 401); that she don't know what

the warrant called for, but heard other ones talking about other persons getting one hundred "and am not positive but one hundred and sixty acres;" heard different ones talking (p. 41); she went to the lawyer's office to sign this paper and get the money for it, and she signed the paper so it could be sold. He told her that she got $107 for it. Harriet went with her and signed the paper, too (pp. 48, 50); her children all knew that her father was a Mexican soldier, and that is about all they did know. They all knew when they grew up that he was in the Mexican war; she took the children to see the soldiers when they came home and they afterward knew she applied for a pension, and the children that were old enough to know knew that she got money, some of them did, as they got older, that she drew a pension (pp. 51, 53).

Mary J. Remsen, who married George W. A. Remsen, in 1864, deposes: That she knew that George W. Remsen was a Mexican soldier some time after she was married; suppose she heard it from her mother-in-law or husband; heard it discussed in the family that he was a Mexican soldier. Her mother-in-law was drawing a pension when the witness married, and lived in the same house with her (p. 65 et seq.). It was generally known in the family that George W. Remsen died in the Mexican war and that his widow received a pension (p. 69). She lived in Philadelphia about four years after she was married; Mrs. Wetzel lived with her most of the time; was very intimate with her and was told by her that her husband died in the Mexican war and having a hard time getting along with her children (p. 72 et seq.). Had heard her speak of Gen. Small attending to her business, attending to this pension (p. 73).

Clara B. Remsen, daughter of George W. A. Remsen, deposes: That prior to the meeting at Mayne's office in 1891, had heard her mother speak about the land and the claims of the heirs (p. 78). She knew that her grandfather was a Mexican soldier; had heard her grandmother say so often enough for her to know that he was a soldier; had known this fact a good many years; knew that her grandmother drew a pension ever since witness was quite small; they lived together and couldn't very well help knowing (p. 78).

John U. Hergesheimer, the husband since 1882 of Emma F. Becket, who was the daughter of Mary Ann Remsen, deposes: That he heard through the family in some way, and that it was generally known, that Mrs. Wetzel's first husband was aMexican soldier and died in the Mexican war. Had heard his wife speak of these things. Witness knows that Mr. Remsen's widow received a pension from the government and learned that from the family (p. 82).

John Wesley Remsen, who was born in 1837, deposes: That he knew, from his mother, that his father was a soldier in the Mexican war; thinks he saw him with his uniform on; that the family all knew that their father was in the Mexican war; that his mother drew a pension from the government. His mother told him so, and she told the older ones and they told the younger ones, witness supposes. Does not recollect anything about whether his mother was appointed guardian or not, but was before the court, he remembers. This witness was a soldier in the last war and knew that the soldiers got a bounty; had heard that Mexican soldiers and soldiers in the war of 1812 got them. Never inquired to find out whether his father got a bounty or not. After he grew up he never thought anything about it (pp. 90, 92).

Harriet Van Zant, who was Harriet A. Remsen, is sixty years old. Remembers seeing her father and that he went to the Mexican war; that was what the children were taught—that the father went to war and never came back; her uncle told her he was killed in the war. Her mother got a pension and was appointed guardian of the children. The children all went to the Orphans' Court with her (pp. 99, 100). She knew that her mother got a pension; knew when she drew it at the United States Mint (p. 102).

Emma F. Hergesheimer, daughter of Mary Ann Remsen, deposes: That it was generally known in the family that George W. Remsen was a Mexican soldier (pp 119, 120).

James W. Hopkins, the brother of the soldier's widow, deposes: That he knew of George W. Remsen being a soldier in the Mexican war, and that he died during the siege of Pueblo while Col. Childs was besieged there by the Mexican troops (p. 128); that after his death his widow got a land warrant; that

witness has known about it for a good many years; that she sold the warrant; that it was reported generally among the family that she had a land warrant and sold it; it was generally known among the children; witness' father sold his about the same time (p. 129).

Throughout their testimony, the various complainants strenuously endeavored to make it appear (some of them by explicit denials) that they had no knowledge or notice of the existence of this land warrant, of its assignment, or the issue of the patent, or of any of their alleged equities, until a short time before the month of August, 1891. They were closely pressed on cross-examination upon this subject. But it appears in contradiction of this, from the examination of George L. Hendrickson, who testified subsequently to the defendants (p. 194), that he went to Philadelphia some time between the seventh and fifteenth days of December, 1889, and then had a conversation with Elizabeth and Mary J. Remsen relative to this claim, and stated his errand to be to obtain a power of attorney from her and the heirs of George W. Remsen to obtain the title to lands in Minnesota. That Mrs. Wetzel thought she never had any land in the West that she knew of excepting that right under the Mexican warrant of George W. Remsen; that they had sold it; that witness told them that there was some right in the heirs and that there was a defect in the title. Witness told them that the land was located with a Mexican land warrant issued to the heirs of George W. Remsen; that he met Mr. William C. Mayne at Philadelphia at that time.

After this testimony had been taken, it was stipulated (p. 197) as facts in this case that in December, 1889, Mr. William C. Mayne, one of the counsel for the complainants, knew that the land warrant had been issued to the widow and heirs of Remsen; knew of its assignment and knew the property upon which the warrant had been located; that a patent had been issued to Taylor; that in December, 1889, he inspected the warrant assignment, appointment of guardian, and the patent, at the land de-

partment in Washington; that during December, 1889, and January and February, 1890, he communicated with all the complainants, excepting the heirs of George W. A. Remsen, the fact that a Mexican land warrant had been issued to said widow and heirs, and that there was a question of the validity of the sale and assignment thereof and a chance to claim the land located thereon, without disclosing to them the location of the land; that the question of giving power of attorney to another party than himself for the purpose of bringing suit and settlements was discussed; that the parties declined, at the time, to execute a power of attorney until they were informed of the location of the land and its value, which Mr. Mayne declined to give, because the parties for whom he was acting and who had discovered the alleged defect in the title had instructed him not to do so. That said negotiations continued until about May, 1890, when they were broken off, without ever having disclosed to them or any of the heirs such location or its value. That thereafter he did not act for said parties but did make a personal investigation, for the purpose of ascertaining the exact location of this land and its value and the parties in possession under such mortgage, and that on August 18, 1891, he caused the complainants to meet at his office, when he communicated to them, for the first time, the exact location of this land, and fully discussed the matters stated in the bill, and thereafter acted as their attorney. That prior to said time Mayne had not acted as attorney of the complainants in respect of any of the matters in controversy.

The law presumes conclusively upon the principle, alike applicable to civil and criminal responsibility, that every one is bound to know the law, that Remsen's heirs knew from the time they arrived at age of discretion that he was entitled to a land warrant as the legal consequence of his military service. This knowledge put them upon inquiry, and inquiry would have shown by record all the facts of which such complete ignorance up to August, 1891, is averred in the bill. If the party "had the means of knowledge or discovery in his power, he will be deemed to know all that, with ordinary care, he might have obtained knowledge of" (Shiras, J., in Sage v. R. R. Co., supra);

"every step taken in procuring the same" (i. e., the patent) "was made part of the public records of the federal * * * land departments which were open to the scrutiny of the public. The lands were offered for sale and sold to various purchasers, who entered into actual and open possession of the premises, and thus notice in every possible way was given to all the world that the defendants claimed the land with full right to sell and dispose of the same." (Id.)

"Under such circumstances the law raises an obligation on the part of the cestui que trust to make use of reasonable diligence in uncovering and unearthing the fraud and in applying to the courts for legal redress. In this case twenty-eight years elapsed from the time the scrip was procured of Sophia Felix, and nearly twenty-seven years from the time it went into the possession of Patrick, before the bill was filed. It admits of no doubt that if Sophia Felix and these plaintiffs had been ordinary white citizens, under no legal disability, such as those arising from infancy, lunacy or coverture, this lapse of time would be fatal to the recovery, at least unless it was conclusively shown that knowledge of the fraud was not obtained, and could not, by reasonable diligence, have been discovered within a reasonable time after it was perpetrated."

"A simple letter to the land department at any time after this scrip was located would have enabled them to identify the land and the name of the person who had located it." (Brown, J., in Felix v. Patrick, supra.)

The possession for many years of the defendants in the case at bar, and of those under whom they claim, was notice to these plaintiffs and to their predecessors. (Shiras, J., ante.) This was no obscure and unimproved tract. For years it has been a part of a great city, and for years before this suit was brought railroads, warehouses, stock yards, residences, business structures of all kinds, stood upon the site, a notice and challenge to all the world that the possessors who had thus invested hundreds of thousands of dollars in these improvements claimed full title to this property. It was at least sufficient for many years to put every person on inquiry and to charge every person with all the knowledge that such inquiry would impart.

There was, besides, an enormous increase in the value of the land itself, to $1,000,000 (see ante. in statement of the case)—grown to be worth about 6,000 times more than it was when it was entered.

But the evidence presents a case of laches entirely independent of legal presumptions of knowledge, notice or acquiescence. It is that laches of the plaintiffs from December, 1889, when they were sufficiently (we think fully) informed of all the facts (by Hendrickson, p. 194), until June, 1892, when this suit was commenced. In the nineteen months between these dates these plaintiffs were absolutely inert; they brought no suit, gave no notice to occupants, made no demand, started no rumor, but were as silent and passive as they and their predecessors had been from the beginning.

There was no ignorance either of fact or law to excuse this. These plaintiffs were learned in the law of laches. That fact indubitably appears in the testimony of very one of them, elsewhere referred to, where by evasion, quibble and denial each sought to make it appear that he or she had no knowledge and had never heard about this matter or their rights until about August, 1891. Hendrickson testified afterwards, and his testimony was a portion of the effectual means which produced the stipulation (p. 194) which, with Hendrickson's testimony, so effectually contradicts and retracts the prevarications and denials as to date of obtaining knowledge to which we have referred.

Now, nineteen months' delay under the facts of this case constitutes laches, under many of the authorities that we have cited. In Felix v. Patrick, the heirs of the half-breed asserted that they were in ignorance and under disability up to 1887. Their bill was filed in 1888. It affected property in the City of Omaha, and the situation of the defendants and the merits of their case were much the same as in the case at bar. Yet the court held the laches a bar.

The bill is insufficient in its allegations to excuse laches under the doctrine of Badger v. Badger (2 Wall., 307) and other cases cited; while the evidence shows most conclusively laches by these complainants and their predecessors for forty years, and especially shows gross laches from the time when they received full information in December, 1889, up to the date of the commencement of this suit in June, 1892.

III.

THE WARRANT IN QUESTION WAS PERSONAL PROPERTY AND WAS ASSIGNABLE BY THE GUARDIAN OF THE MINORS.

"Real property consists of freehold estates in land, i. e., of estates of inheritance or for life. * * * Personal property embraces all objects or rights which are capable of ownership, except freehold estates in land, and incorporeal hereditaments issuing thereout or exercisable within the same. The word 'chattel' * * * embraces all property not freehold. * * * Personal property as above defined comprises leasehold estates and other interests in land less than a freehold."

Brantley Pers. Prop., sec. 2.

"Every species of property, movable or immovable, which is less than a freehold must be a chattel."

1 Schouler Pers. Prop., sec. 8.

3 Am. Cycl. of Law p. 163.

"Chattels is a very comprehensive word, and includes every kind of property which is not real estate or a freehold."

3 Cycl. of Law, 164.

Many authorities fully sustain the proposition that this land warrant was personal property.

Statutory restrictions of assignability are not favored and are construed strictly.

Mullen v. Wine, 26 Fed. Rep., 206.

Randon v. Barton, 4 Tex., 289.

Rose v. Wood, 73 Cal., 385.

Knight v. Leary, 54 Wis., 459.

Townsend v. Fenton, 30 Minn., 531.

Lamb v. Davenport, 18 Wall., 307.

Myers v. Croft, 13 Wall., 291.

Thredgill v. Pintard, 12 How., 15.

Maxwell v. Moore, 22 How., 185.

French v. Spencer, 21 How., 228.

Strongfellow v. Caine, 99 U. .S, 610.

Hussey v. Smith, 99 How., 20.

Doe v. Wilson, 23 How., 458.

Graham v. Henry, 17 Tex., 167.

Stone v. Brown, 54 Tex., 334.

Cox v. Bray, 28 Tex., 248.
Dodge v. Little, 73 Tex., 319.
Hearne v. Gillett, 62 Tex., 25.
Lipscomb v. Nichols, 6 Colo., 290.
Webster v. Luther, 50 Minn., 77.
S. C., 163 U. S., 331.

The act of February 11, 1847, under which this warrant was issued, provides for the issue of a warrant for 160 acres which may be located by the warrantee or his heirs at law, upon any public lands subject to private entry, and for the issuance of a patent therefor upon the return of the warrant to the general land office. In the event of the death of the soldier, the warrant shall issue in favor of and inure to the benefit of his family; first, to the widow and his children, etc., etc. If his children are minors, then the legally constituted guardian of such minor children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the Orphans' or other court having probate jurisdiction, have the power to sell and dispose of such warrant for the benefit of those interested.

It is not to be considered that congress intended to legislate upon the status of minors in Pennsylvania or as to their property rights or as to the powers of guardians appointed by the state court. Congress could provide that the United States would not recognize any assignment of the warrant unless made under certain circumstances and in a certain way. The provision in regard to assignments in this act was inserted not as a regulation or restriction of the common law or (state) statutory power of a guardian. It was for the protection of the United States in its dealings with the warrant, and could have been waived by it.

A guardian may, without order of court, sell personal property of the ward in his possession. This is an ancient rule of the common law, and statutes giving this power are merely declaratory and cumulative.

The guardian "may sell the personal estate for the purposes of the trust without a previous order of the court."

2 Kent Com. Marg., p. 288.

Field v. Schieffelin, 7 Johns., Ch. 154.

Ellis v. Essex M. Bridge, 2 Pick, 243.

Lamar v. Micou, 112 U. S., 452.

Even where a statute provides that the Probate Court may authorize and require the guardian to sell personal property, such a provision is cumulative and permissive, not mandatory, and does not take away or impair his common-law right to sell without such authority.

This is clearly held in Wallace v. Holmes, 9 Blatchf., 65-77 (25 Myers Fed., 132), where a statute of Massachusetts so provided, and a guardian without applying to the Probate Court, and without any authority or approval by it, assigned the interest of his minor ward in a patent to an invention. The assignment was sustained as valid at common law.

"Upon being duly authorized by the Orphans' or other court having probate jurisdiction" is the language of the act of congress. It does not say "by order" or "by direction" of such court.

If at common law or by the laws of Pennsylvania, the letters of guardianship issued by the Orphans' Court, invested, as they did, the guardian, with the power to sell personal property, they were under such statutes his "due authority" and they "duly authorized" him so to do, and as to the transfer of this warrant, this guardian was "duly authorized" to make the assignment to Taylor.

And this is precisely what the officers of the United States general land office held (if we concede that there was no special order of the Orphans' Court) in the course of proceedings under which the patent issued. The testimony shows (p. 203) that this warrant was deposited by Taylor as assignee in the local land office, was there located by him as assignee, and was received in satisfaction of the location.

No statute of the United States ever enacted that such warrants are real estate. All the statutes ever enacted upon the subject treat them as personal property; for instance, the statute of June 3, 1858, sec. 2444 R. S., provides:

"When proof has been or hereafter is filed in the pension office, during the lifetime of a claimant, establishing to the satisfaction of that office his right to a warrant for military services, and such warrant has not been, or may not be, issued until after the death of the claimant, and all such warrants as have been heretofore issued subsequent to the death of the claimant, the title to such warrants shall vest in his widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant; and all military bounty land warrants issued pursuant to law shall be treated as personal chattels, and may be conveyed by assignment of such widow, heirs or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only."

This act of 1858 expressly provides that all military bounty land warrants theretofore issued subsequent to the death of the claimant, pursuant to law, shall be treated as chattels.

We insist that the act of 1858, as to past and future assignments of warrants, placed such documents upon the ground of personal property and made them assignable as to past and future assignments without the order of any court. The regulation of the manner of assignments is a matter between the government and the person entitled to the warrant, and it would be a strange condition of the law if all warrants up to 1858 were real estate, and all warrants after that year were personal property, and each class governed by different rules of assignment, by absolute want of such power in some cases and of absolute power to assign in other cases according to their classification as to time.

Again, the act of March 22, 1852, sec. 2414 R. S., provides that:

"All warrants for military bounty lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the commissioner of the general land office, so as to vest the assignee with all the rights of the original owner of the warrant or location."

These two statutes of 1852 and 1858 removed by relation th necessity, if there ever was any, of having any order of the O phans' Court for the assignment of the interest of the infan heirs in the warrant, such provision in the act of 1847 being, a we insist, simply a matter between the government and the hei for the protection of the government, which the governmen might waive.

Cooley, Const. Lim., 5 Ed., 458.
2 Hare, Am. Const. Law., 742.
Satterly v. Matthewson, 13 S. & R., 380.
S. C., 2 Peters, 380.
Wilkinson v. Leland, 2 Peters, 667.
Hess v. Works, 2 S. & R., 356.
Davis v. St. Bank, 7 Ind., 316.

Brush v. Ware, 15 Peters, 93, will doubtless be cited by th appellants. It is to be observed that this case was decided i 1841. The defense of limitation or laches does not seem to hav been considered or even suggested. It was assumed, withou argument, by the court, that the ancestor's right to locate 4,00 acres of land was real estate which did not pass by his will an which the executor had therefore no right to alienate. It als appeared that the transaction by which Ladd, under whom th defendants claimed, obtained the certificates was by a fraudu lent contract with the executor and for a grossly inadequate consideration, viz., $40 and a pair of boots. The case was decid ed upon peculiar and exceptional grounds applicable to the lo cation of such military claims in Ohio and Kentucky, which hav restricted the application of the decisions of the Supreme Cour in questions as to titles in those states. The warrant entitled t locate lands in Ohio. It was a Virginia warrant, and such war rants were real estate by the laws of Virginia and Ohio.

"It may be stated that in some of the states land warrants are not regarded as real estate in the settlement and distribution

of estates in the Probate Office. (Moody v. Hutchinson, 44 Me., 57.) But a different doctrine is held in Virginia and Ohio, in respect to the land, where one who is entitled to a patent dies before it is issued. The right, unless devised, goes to his heirs."

3 Washb., Real Property, 4 Ed., p. 200, citing:

Brush v. Ware, 15 Pet., 93.

Reeder v. Barr, 4 Ohio, 458.

Brush v. Ware was a case of actual fraud perpetrated by the executor upon the heirs. The court went behind the patent because, as it said:

"Whatever doubt might arise on this question of common law principles, there can be none when the peculiar circumstances under which this title originated are considered. In Ohio and Kentucky this question has long been settled judicially, and this court, following the decision of those states, has also decided it."

Brush, as assignee of the warrants, obtained the patent in his own name. And the court said (p. 111):

"Can it be contended that the defendant who purchased an inchoate title, a mere equity, was not bound to look into the origin of that equity?"

Some of the plaintiffs were minors at the time of the commencement of the suit.

So that the Brush case would be an authority here only if the Remsen heirs had sued Taylor, the assignee of the warrant, immediately after he received the patent.

Notwithstanding this expression of Mr. Washburn's stating an early Ohio case for its support, it was held in Dixon v. Caldwell, 15 Ohio St., 412, that the bona fide purchaser of a land warrant for value, who is chargeable neither with notice or want of diligence in making his purchase, after locating the warrant and obtaining a patent for the land located, is not, in equity, a trustee of the legal title of the true owner of the warrant, although it was obtained by the fraud of a third person and transferred under a forged assignment. For the conversion of the warrant, the legal owner has a clear right to recover its value at the time of the conversion, the good faith of the purchaser being no defense to the legal demand. The court said:

"The controversy here is not solely in regard to the land warrant. The legal title to that was clearly vested in the plaintiff,

and for its conversion he has a plain, legal remedy against the defendant for its value, and, before it was lost in entering the land, for its recovery in specie. The question is whether in the light of equity the measure of legal relief is to be regarded as inadequate and the defendant required by court of equity to surrender the land to which he acquired the legal title in good faith, and, as he supposed, for his own benefit, by the combined use of the warrant and his own means, industry and enterprise.

"The defendant claims to be a bona fide purchaser of the land in controversy for value, without notice of the plaintiff's rights, and relied for his defense upon the rules of equity for the protection of such purchasers.

"The land warrant in question was assignable in law, was in possession and apparent ownership of the vendor, and the assignment was regular in form. The defect in the vendor's title was not apparent, and there was no reasonable ground for suspicion that the assignment had been forged. The defendant purchased and paid full value for the warrant and is not chargeable with a want of reasonable diligence in so doing. Having no reason to suspect the existence of the plaintiff's title to the warrant, he was, in equity and good conscience, chargeable with no duty toward him in relation to its future use. If he withheld it from entry he would have been liable to return it to the plaintiff or pay him its value. The good faith of his purchase would have been no answer to the plaintiff's legal demand. After the location of the warrant, the holder of the legal title thereof acquired an equity in the land upon which the location was made, and before the defendant clothed himself with the legal title, and while the equities were open between the parties, Caldwell's equity being older in time would have been better in right. But Dixon, unaffected with fraud or notice, upon a valuable consideration paid, having obtained the legal title to the land in controversy, brings himself within the protection awarded in equity to the letter of the legal estate."

No guardian was appointed for Harriet A. Remsen, who was seventeen years of age and a married woman when she signed her maiden name to the assignment of the warrant. This assignment by her was not void, but was voidable merely.

"All the books are said to agree in one result that whenever the act done may be for the benefit of the infant it shall not be considered void, but he shall have his election, when he comes of age, to affirm or avoid it."

2 Kent, Com. Marg., p. 234.

In such cases he is bound to give notice of disaffirmance of the contract in a reasonable time after coming of age. (Holmes

v. Blogg, 8 Taunt., 35; Goodnow v. Empire Lumber Co., 31 Minn., 468, cited ante, as to laches.)

But were her assignment void by reason of infancy or coverture, her case would stand upon the principles declared in Felix v. Patrick, and Dixon v. Caldwell. In the former case the assignment of the scrip was absolutely void because prohibited by statute. In the latter the assignment was a forgery. Both courts held the action barred, upon the general equitable grounds stated in the opinions from which we have presented full quotations.

For many years the right to assign "soldiers' additionals" has been contested in the courts, and has been sustained. In the process of these adjudications the method and form of the assignment in many cases raised the question, sometimes directly, sometimes indirectly, whether these "soldiers' additionals" are, before location, personal estate or real estate. We have found no decision holding them to be real estate. On the contrary, several courts have expressly held them to be personal property, and all the courts which do not explicitly so hold treat them as such by necessary implication. And necessarily so, because, if they were real estate, they could be transferred only by formally executed deeds.

The question as to the assignability of soldiers' additionals has finally been settled by this court in Webster v. Luther, 163 U. S., 331. The opinion sets forth in full the very complicated legislation out of which these questions arose. In its opinion this court says:

"The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition

would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by sec. 2306 of the Revised Statutes contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns."

That a deceased soldier's additional right belonging to his minor children is assignable by their guardian as personal property, and that an order of court is not necessary to empower him to do so had been previously held by Mr. Justice Brewer in the case of Mullen v. Wine, 26 Federal Rep., 206. The minor children of the soldier became entitled to locate and enter eighty acres of public lands as an additional homestead. They resided in Minnesota, and their guardian sold this right and received the money for it.

The court says:

"There are really but two questions in the case: First, was this right to locate and enter personal property? Second, was it assignable? For that the guardian, under the laws of Minnesota, could, without any order of court, sell personal property belonging to his ward is conceded. That he did sell this right, and did receive the stipulated price, is beyond doubt. If the title once passed from the minors to Talbot, that is the end of the matter. Any wrong in the location and entry, if wrong there was, was one which only the government could challenge, and could not be made by a private individual, even the minors themselves, the basis of attacking complainant's title.

"Now, this right to enter and locate eighty acres was a thing of value—something which enlarged the estate of the minors—was property. It was personal property, going with them where they went; could be exercised and enjoyed anywhere; did not descend to the heir; was not attached to any particular tract of land; was therefore neither permanent, fixed nor immovable. It was a mere right of selection and taking. Like all property,

it was the subject of sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld. To preserve the Indian's title an express restriction is inserted in the patent. The same or something equivalent is always necessary to stay the power of disposal which attends the ownership of property. When this right has been exercised, the location and entry made, who would doubt the right to sell the land? Yet why should the right to sell exist after entry and not before? Congress has placed no restriction—who may? It must be borne in mind that this is not a case in which there is to be future consideration or future duty. It is personal, in that only they of a certain class can avail themselves of the gift. It is not personal in the sense that future services or future conditions are imposed. Services already rendered during the war are the consideration. The homestead duty of occupation or improvement has already been performed. It amounts to simply this: In view of what has been done, congress makes this gift. It places no restrictions on the donee, but leaves him to use the gift as he sees fit. Why may he not sell it?

"I see no satisfactory reason to the contrary. Hence I answer the two questions in the affirmative."

It is familiar doctrine, as to properties of the character of military bounty lands, that they are assignable in all cases not prohibited by statutes. Among many decisions to this effect we cite:

Myers v. Croft, 13 Wall., 291.

Townsend v. Fenton, 30 Minn., 531.

Camp v. Smith, 2 Minn., 172.

Maxwell v. Moore, 22 How., 185.

Lamb v. Donenfast, 18 Wall., 307.

In holding such rights assignable the maxim is repeated in nearly all decisions that "restraints upon the right to alienate property are not favored."

In Rose v. Wood and Lumber Company, 73 Cal., 285, the Supreme Court of California held that soldiers' additionals were assignable. The same conclusion was reached by the Supreme Court of Wisconsin in Knight v. Leary, 54 Wis., 459.

The courts have universally held strongly against restrictions upon alienation, and in many cases kindred to that at bar, involving the assignability of similar rights such as additional rights of location under the Texas land laws, mineral rights; the rights under the Oregon donation act, occupants' rights under the townsite law, and various other rights granted by congress

and by the several states, to locate lands—such rights have been held personal property and assignable whenever not specifically prohibited by the statute creating the right, and in some instances, notably the Oregon donation act, the courts placed the strictest construction possible upon the provisions of the act in restraint of alienation. (Lamb v. Davenport, 18 Wall., 307.)

And here we repeat that if the land warrant here in question was the personal property of certain minors resident in Pennsylvania for whom a guardian had been appointed by the Orphans' Court of that state, that guardian had the common law right to assign the warrant. He derives it under the common law through his appointment as guardian by the Orphans' Court, which, by such appointment, did authorize him to do all things that a guardian might do at common law; hence the appointment was a sufficient authorization by the Orphans' Court to assign this certificate.

In Myers v. Croft, 13 Wall., 291, the prohibition of alienation was as follows: "And all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void." The Supreme Court held that a conveyance of the land by the pre-emptor, after entry and payment for the same, but before the issue of the patent, was valid. The court says:

"This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and, independently of the legislation of congress, assignable."

Lamb v. Davenport, 18 Wall., 307, was a construction of the Oregon donation act, which declared that all contracts by any person or persons for the sale of the land to which he may be entitled under the act before he, or they, shall have received patent therefor shall be void.

So also Maxwell v. Moore, 22 Howard, 185, construing the act of 1812 (2 Stat., 429) and the act of 1826 (4 Stat., 190) concerning the granting of military bounty lands. The act of 1812 prohib-

ited the assignment or transfer in any manner of any claim for the warrant until after a patent should have been granted. The act of 1826 was upon the same general subject, but contained no such restriction. It was insisted that the acts were in pari materia, and that, therefore, the restriction in the act of 1812 was operative. This court, however, held otherwise.

See also French v. Spencer, 21 Howard, 228.

Under an act passed in 1816 (3 Stat. at Large, 256) the same question arose as in the case last cited, and the same decision was made.

This court has come to the same conclusion as to the assignability of an inchoate right to a deed under the townsite act.

Stringfellow v. Caine, 99 U. S., 610.

Hussey v. Smith, 99 U. S., 20.

In Doe v. Wilson, 23 Howard, 458, the treaty of October, 1832, between the United States and the Pottawotomie Indians contained the following provision:

"The United States agree to grant each of the following persons the quantity of land annexed to their names, which land shall be conveyed to them by patent. * * * To Pet-chi-co two sections," etc., etc. Then the treaty provided: "The foregoing reservations shall be selected under the direction of the president of the United States after the land shall have been surveyed and the boundaries to correspond with the public surveys."

Before the lands were selected Pet-chi-co sold and assigned his interest, but died before the patent was issued. After his death a patent was issued in his name. Held, that the land passed by relation to his assignee, and one of the questions argued was whether this right was assignable. The court said:

"Although the government alone can purchase lands from an Indian nation, it does not follow that when the rights of the nation are extinguished an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property, and alienable, unless the treaty had prohibited its sale."

Under the various statutes of Texas, persons who had taken public lands became entitled to "additional" lands under certain circumstances. The Supreme Court of Texas has considered the assignability of such certificates in many cases, and held them

assignable by formal assignment or under blank powers of attorney, or even orally and by delivery.

Randon v. Barton, 4 Texas, 289.

Graham v. Henry, 17 Texas, 167.

In the case of Stone v. Brown, 54 Texas, p. 334, the court said:

"These transfers were in every respect complete, save and except the blank for the name of the vendee and consideration were not filled. In our opinion, this did not render the transfers invalid. (See Hollis v. Dashiell, 52 Tex., 187.) Aside from this view, our Supreme Court has from the first held and treated unlocated land certificates as personal property, so far considered chattels, that they are the subject of verbal sale and delivery, and that such sales are not within the statute of frauds and need not be in writing. (See also Cox v. Bray, 28 Texas, 247.) The contract was not for the sale of land. It was for the sale or assignment of the unlocated certificate. The certificate of itself did not give to or vest in the grantee a title to the land, but a right to acquire it. It was merely the obligation of the government, entitling the owner of it to secure the designated quantity of land by following the requirements of the law."

See also Dodge v. Litter, 73 Texas, 319; Hearne v. Gillett, 62 Texas, 25.

It is well to note in reference to the certificates considered in these Texas cases that they were very similar to the "additional" certificates issued by the United States, and the military bounty land warrants. They were issued under the rules of the land department of Texas; they were merely certificates of the right to locate anywhere in the public domain a certain quantity of land, and by such location acquire the title to the land so located; some of them were additional bounty for military services rendered; some were settlers' additionals; but all were mere rights similar to those conferred by a military bounty land warrant.

The grounds upon which the courts base their opinions that these rights were assignable as personal property, are similar to the reasons given by Justice Brewer and the other courts for the assignability of the "soldier's additional" and other similar rights granted by acts of congress.

The Supreme Court of Minnesota has consistently held against restrictions upon the right of alienation. In Camp v. Smith, 2 Minn., 172, decided in 1858, long before the decision of the Supreme Court of the United States in Myers v. Croft, the Supreme Court of Minnesota arrived at the same conclusion, and, considering whether a conveyance of land after final entry and before patent was prohibited by the restrictive clause in the pre-emption law, said:

"Land in the United States is as much the subject of traffic almost as merchandise, and that trade is rather encouraged than restricted by law. Half the titles in the new states and territories would be unsettled if a transfer of the land by a pre-emptor is prohibited before the issuing of the patent. On grounds of public policy, therefore, such an interpretation should be given to the pre-emption law as will not interfere with the free transfer of lands in the state; and to that end it should, if necessary, be strictly construed, so as not to prohibit the assignment or transfer of anything not specifically and unmistakably designated."

That court also held, in Townsend v. Fenton, 30 Minn., 531, that a contract made by a homesteader, under the original homestead law, to convey the property to be acquired by the homesteader after he should receive the patent therefor, was not interdicted by the provisions of sec. 2291 of the Revised Statutes of the United States, and the court has consistently adhered to its position in the cases of Red River, etc., R. Co. v. Sture, 32 Minn., 95; Lewis v. Wethrell, 36 Minn., 386; Lang v. Morey, 40 Minn., 396.

IV.

WHETHER THE ORPHANS' COURT HAD AUTHORIZED THE GUARDIAN TO SELL AND ASSIGN THIS WARRANT IS A QUESTION OF FACT WHICH WAS TO BE AND WAS CONSIDERED BY THE DEPARTMENT OF THE INTERIOR IN ISSUING THE PATENT. THE DETERMINATION OF THE DEPARTMENT UPON THIS QUESTION IS CONCLUSIVE UNDER THE CIRCUMSTANCES OF THIS CASE.

In Lee v. Johnson, 116 U. S., 48, it was sought in equity to have the holder of a patent of public land declared a trustee for

the benefit of the complainant, on the ground that the patent was improperly issued. The plaintiff entered the land in controversy as a homestead. After the entry he resided upon the land only occasionally, offering as an excuse that the health of his wife required him to remain at their home in Kent county. At the outset he employed his son-in-law Shaeffer and his family to go upon the land and remain there in his employ until his wife's health should be so improved as to admit of his leaving her, or taking her with him in his personal settlement upon the land. Afterwards some attempts were ostensibly made toward a personal settlement, but they were at long intervals apart and for comparatively short periods. Lee complained to the land office that Johnson had abandoned the land for more than six months, and a contest took place between them as to the right to the land. The usual proceedings were had before the register, and the commissioner decided in favor of Johnson. On the appeal, the decision was reversed by the secretary and the entry ordered to be canceled. Lee then entered it under homestead laws and received the patent. The court said:

"The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which congress has devolved exclusively upon the department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence. It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented. It must appear that they affected its determination, which otherwise would have been in favor of the plaintiffs. He must, in all cases, show that but for the error or fraud or imposition of which he complains he would be entitled to the patent. It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. * * *

"Without going into any detail of the evidence presented to the commissioner and the secretary of the interior, but taking the general statement of its nature, it is clear that their attention was drawn by it to the character of the settlement of John-

son, and that they considered whether his entry was made to acquire a home for himself or for his son-in-law, whether his residence had been sufficiently personal and continuous to save and perfect any right, if, in fact, he had ever initiated any, and whether or not he had abandoned the land. The findings of the secretary upon any of these matters must be taken as conclusive in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the department upon matters of fact cognizable by it has been expressly affirmed."

Johnson v. Towsley, 13 Wall., 72.
Shepley v. Cowan, 91 U. S., 330, 340.
Moore v. Robbins, 96 U. S., 530, 535.
Quinby v. Conlan, 104 U. S., 420, 426.
Smelting Co. v. Kemp, 104 U. S., 636, 640.
Steele v. Smelting Co., 106 U. S., 447, 450.

"Undoubtedly there has been in all of them (i. e., cases) some special ground for the exercise of the equitable jurisdiction. for this court does not and never has asserted that all the matters passed upon by the land office are open to review in all the courts. On the contrary, it is fully conceded that when these officers decide controverted questions of fact in the absence of fraud or imposition or mistake, their decision on these questions is final, except as they may be reversed on appeal in that department."

Johnson v. Towsley, 13 Wall., 86 Op.

V

A PATENT RAISES A PRESUMPTION THAT ALL OF THE PREVIOUS REQUISITES OF THE LAW HAVE BEEN COMPLIED WITH. THAT PRESUMPTION, UNDER THE CIRCUMSTANCES OF THIS CASE, IS CONCLUSIVE.

If it was necessary for the Orphans' Court, by some specific order, to authorize the guardian to assign the warrant, it will be presumed that such authority was given, for the following reasons: 1. The patent raises that presumption at any time. 2. The lapse of time since the granting of the patent, the open possession, the rise in value, the improvements upon the prop-

erty, its becoming a portion of a great city, the inaction of the heirs, and all the circumstances and evidence create such a presumption and make it conclusive.

Discussing the law of presumptions, in support of titles and other rights from lapse of time, Mr. Best observes:

"There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Matters of record generally, and even acts of parliament, at least very ancient ones, will thus be presumed, * * * as also writs of ad quod damnum and inquisitions thereon, fines and recoveries; * * * consent of the ordinary to composition deeds, * * * and lawful executorship will be presumed from lapse of time."

2 Best, Ev., sec. 393.

"Presumption of title need not be founded upon what is believed to have happened, but upon what may have happened."

St. Mary Magdalen College v. Atty. Gen., 3 Jur. (N. S.), 675.

"The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals and also to protect the state from imposition. Officers are appointed to superintend the business, and rules are framed prescribing their duty. These rules are in general directory; and when all proceedings are completed by a patent issued by the authority of state, a compliance with these rules is pre-supposed. That every pre-requisite has been performed is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself. It might, therefore, be extremely unreasonable to avoid the grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent."

Polk v. Wendal, 9 Cr., 98.

"A grant or a concession made by that officer by law authorized to make it carries with it prima facie evidence that it is within his powers; no excess of them or departure from them is to be presumed; he violates his duty by such excess and is responsible for it. He who alleges that an officer entrusted with an important duty has violated his instructions must show it." See also, to the same effect, the expressions of the Supreme Court of Minnesota in McKinney v. Bode, 39 Minn., 350, supra.

Delassus v. U. S., 9 Pet., 134, Opinion.

2. As to the presumption from lapse of time.

"Where it is shown that any person has for a long period of time exercised any proprietary right which might have had a lawful origin by grant or license from the public, or from the

private person, and the exercise of which might, and naturally would, have been prevented by the persons interested if it had not had a lawful origin, the presumption arises that such right had a lawful origin and that it was created by a proper instrument which has been lost."

Lawson, Presumpt. Evidence, p. 403, and cases cited in note.

In Strimpfler v. Roberts, 18 Pa. St., 299, Chief Justice Black, in considering the presumptions created by lapse of time as affecting disputes as to land, uses this language:

"It is true that the transaction which creates the contest between these parties is entirely too old to be investigated now with the slightest hope of ascertaining the truth. It is impossible for us to feel any confidence in the evidence which can be furnished by men of these times concerning occurrences so remote. Fifty-two years went round between the time when the purchase money for this land was paid and the bringing of the present suit. During all that time neither Benson, nor his heirs, nor anybody else deriving title from him, made any claim to the land, nor paid taxes for it, nor exercised any act of ownership over it, nor manifested the least sign of consciousness that they had a title to it. We are now asked to determine the rights of the parties, on such facts as can be fished up from the oblivion of more than half a century. Nearly two generations have lived on the earth and been buried in its bosom since this business was transacted. Of the men who were then in active life and capable of being witnesses, not one in twenty thousand is now living. Written documents whose production might have settled this dispute instantly have been, in all human probability, destroyed or lost or thrown away as useless. The matters to a past age, of which we can have no knowledge except what we derive from history, through whose medium we can dimly discern the outline of great public events, but all that pertains to men's private affairs is wholly invisible, or only visible in such sort as to confound the judgment. 'No man,' says Mr. Justice Sergeant, 'ought to be permitted to lie by, while his rights can be fairly investigated and justly determined, until time has involved them in uncertainty and obscurity, and then ask for an inquiry.' For such reasons as this it is that every civilized society has fixed a limited time within which all rights must be prosecuted. Where this is not done by positive enactment of the legislature, the judiciary calls in the aid of a presumption; and courts of equity, though not bound by the statutes of limitation, close their doors against stale demands as sternly as the courts of law. Time will raise presumptions as conclusive for or against an original title as it will in other cases. We have as little power to read the ashes of burnt papers, or call dead witnesses from their graves to testify in a dispute about business transacted by the land-jobbers of the last century, as we

would have if the controversy was on any other subject. It is accordingly settled that the non-return of a survey for some years, without taking possession or paying the surveyor's fees, is an abandonment of the warrant. And even when the negligence is imputable to the officer, a long delay will defeat the warrantee's title. The title of a warrantee is presumed to have been conveyed, where no claim is made under it for a long time. A sale of warranted land for taxes, though irregular and void, if the warrant holder had made early opposition, becomes a perfect title after an acquiescence of twenty-four years. Payment of taxes for twenty-one years is presumptive evidence of a conveyance from the warrantee. A survey unimpeached for twenty-one years is conclusively believed to have been regular; and that even where there is an unexpected order of resurvey by the board of property. In short, the courts of this state seem uniformly (and especially of late) to have refused to go back more than twenty-one years to settle any difficulty about the issuing of warrants or patents, or the making or returning of surveys, or the payment of purchase money to the commonwealth. These questions, like others, are disposed of according to the legal presumptions which arise from the lapse of time. The time which raises a presumption which will act on an interest in land is twenty-one years; and this presumption unrepelled will defeat any claim that is set up against it."

So in the present case, if it shall be deemed necessary that the Orphans' Court should by special order have authorized the guardian to assign this warrant, it will be conclusively presumed, after the lapse of forty-three years from the date of the assignment of the warrant, that such special order was made.

Under the circumstances of this case we insist that such presumption is absolute and incontrovertible. But if it is open to rebuttal, the proof fails in that respect. In fact, there is not foundation sufficient laid to prove by parol in an ordinary case the contents of an instrument asserted to be lost.

Mr. Fortin, the first assistant clerk in the Orphans' Court, deposes (p. 54) that the only record he can find is the petition for the appointment of guardian, filed October 6, 1848. The only search he made for any other record or proceedings was in the indexes to the dockets; as to there being any other papers in the case he only knows from searching the index and the docket; that though the original papers may be lost, there is always a docket entry showing some paper having been filed.

This we submit is wholly insufficient to controvert the presumption that such an order was made.

If it was necessary by order to empower an assignment its existence will be presumed upon another ground, viz.: That public officers have done their duty, have proceeded regularly according to law. Now the officers of the department of the interior must, if this order were necessary, have passed upon the fact of its existence. The theory of the complainants is that the patent could not legally issue to Taylor, unless the assignment of the warrant by the guardian had been specifically authorized by the Orphans' Court. So that, under the above rule, it must be presumed that such order existed and that the officers of that department had it before them. The patent shows that it was issued on a warrant issued to minors among others. There is no testimony of any search in the department for any such order.

VI.

BY EXPRESSLY RATIFYING THE LOCATION OF THE WARRANT IN THE BILL, THE COMPLAINANTS RATIFY THE ASSIGNMENT OF THE WARRANT TO TAYLOR, AND DISENTITLE THEMSELVES TO ANY RELIEF.

The bill states: "Your orators have and do hereby ratify the location of said military land warrant on the land above described, and say that the defendants * * * are the trustees of the said lands for the benefit of your orators."

The assignment of the warrant to him was an indispensible process in the location thereof by Taylor and in the issuance of the patent to him. Hence in ratifying the location of the warrant the complainants ratify its assignment.

No fraud is charged in the bill. Had there been, the ratification would have been simply of the assignment and not of the

fraud—of the result and not of the inducing cause, which is quite another thing. In such cases it may well be that the defrauded party, thus ratifying, can follow the fruits of the fraud. In ratifying the location of the warrant the complainants must ratify its assignment as one indispensable precedent proceeding in its location. In so doing they ratify the act of the guardian in receiving the price, $107, a fair price as the evidence shows.

"There can be no ratification of a part only of a transaction. The law does not allow one part of the transaction to be affirmed and the rest to be disallowed."

1 Am. Cycl. Law, p. 434.
1 Pomeroy Eq. Jur., sec. 916.

Now the warrant and its location are two different things. The warrant is personal property. It describes no lands. It is an official acknowledgment merely of a right conferred by statute to locate 160 acres of land anywhere in the surveyed public domain open to entry. When located the warrant ceases to exist as property by being surrendered in evidence that the privilege which it attests has been exercised. It has simply served the purpose of purchase money in buying so many acres of land. It has been paid or rendered and delivered to the government for that purpose.

In the meantime it has been on the market as personal property. It is assigned in blank and is sold in banks, by brokers, and passes from hand to hand. No deed signed and sealed is necessary to its transfer, as would be the case were it real estate. All the statutes, every decision of the courts speak of it as "assignable," not as "conveyable" or "grantable." The warrant being thus personal property, the ratification of its assignments is the ratification of the transfer of personal property. And equity will not, in its discretion, under the circumstances of this case, follow it into the real estate. This is clearly held in Dixon v. Caldwell, 15 Ohio St., 412, cited supra. This case decides that the remedy of the plaintiff in such case is for the value of the warrant in an action for its conversion, and that the patentee is not in equity a trustee as to the land.

Mr. Justice Brown observes in Felix v. Patrick, supra, after declaring that the transaction in which Felix parted with her warrant was wholly void and "a fraud upon her" (of which there is no allegation, proof or even pretext in the case at bar), that, as to Patrick, who was not charged in the bill with being a party to the means employed to obtain it, and his grantees, "as the case stands at present justice requires only what the law in the absence of the statutory limitation would demand, the repayment of the value of the scrip with legal interest thereon."

But even this relief cannot be granted in the case at bar, because, as we have shown, the complainants have ratified the assignment of the warrant and the receipt by the guardian of its full value.

The decree should be affirmed.

C. K. DAVIS,

FRANK B. KELLOGG,

C. A. SEVERANCE,

Solicitors and of Counsel for the Respondents.